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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

MAMIE LEE WARD,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74 -

MAMIE LEE WARD,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petition prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered on December 30, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at ___ N.C. ___, 210 S.E.2d 407 (1974), and is set out in Appendix A hereto, pp. 1a-8a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of North Carolina was entered on December 30, 1974, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the exclusion for cause of eighteen veniremen on the ground of their expressed attitude toward the death penalty violated petitioner's rights under the Sixth Amendment to the Constitution of the United States by depriving petitioner of a representative jury selected from a fair cross-section of the community?

3. Whether the Sixth or Fourteenth Amendment to the Constitution of the United States requires that a transcript be made of the voir dire examination of prospective trial jurors in a capital case, so as to assure a record of sufficient completeness to preserve a capital defendant's rights against unconstitutional methods of jury selection such as those condemned by Witherspoon v. Illinois, 391 U.S. 510 (1968)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> §14-17 (1969). "Murder in the first and second degree defined; punishment.- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the

punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." 1/

§15-187 (1965). "Death by administration of lethal gas.- Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."

§15-188 (1965). "Manner and place of execution.- The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on April 10, 1974, affirming petitioner's conviction and death sentence. Petitioner, Mamie Lee Ward, a 52 year old black woman, was sentenced to die on September 19, 1973 in the Edgecombe County Superior Court upon conviction for the first degree murder of Frank Parker, a black man with whom she had been living.[2/]

Petitioner had known Mr. Parker for twenty years and had been living with him for three years until two months before the killing. In May, 1973, her daughter moved back to Edgecombe County, and petitioner returned to her own house to care for her daughter and granddaughter. R. 45. Petitioner testified

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2/ Petitioner's sentence of death was imposed under N. C. Gen. Stat. §14-17, as construed by the Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974), on April 8, 1974 which imposes the death penalty for first degree murder, but this statute provides that it is applicable to offenses committed after its ratification. The Supreme Court of North Carolina recently held, by a 4-3 vote, that this legislation was not retrospective and had no effect whatsoever on death sentences imposed under the Waddell decision, State v. Williams, N.C. Sup. Ct. No. 25 (Wake County, Spring Term 1975)(March 12, 1975), slip op. at 8-12. Accord: State v. Avery, N.C. Sup. Ct. No. 33 (Bertie County, Spring Term 1975)(March 12, 1975); State v. Lampkins, N.C. Sup. Ct. No. 11 (Forsyth County, Spring Term 1975)(March 12, 1975).

that Mr. Parker had told her "it won't be any different between us" because of the move, and that she still considered him her "boyfriend". R. 49. On July 18, 1973, Mr. Parker stopped at her house and left a message with her daughter that he would like to see petitioner.

On the evening of July 19, 1973, Mr. Parker was sitting in his living room with one Lucy Taylor. Ms. Taylor, one of the four witnesses who testified on behalf of the State, 3/ stated that she had been Mr. Parker's girlfriend for five months prior to July 19th. Ms. Taylor testified that while Mr. Parker was eating supper, the telephone rang and she answered it by saying, "Parker's residence." There was no response and the other party apparently hung up. Later in the evening, at a few minutes past 8:00, Ms. Taylor heard noises on the front porch and then at the back door. Mr. Parker stated that whoever was there would have to knock. A few seconds later, petitioner appeared in the den doorway "with a shotgun lifted at an angle ready to fire." R. 13. Ms. Taylor testified that petitioner did not say anything, but fired one shot which struck Mr. Parker in the head. Ms. Taylor fled as petitioner was apparently attempting to reload the shotgun.

3/ The State also introduced the testimony of a pathologist, the police officer who first entered the Parker residence after the shooting, and the police officer who took a statement from petitioner a few minutes after the shooting.

Police Detective A. F. Watson testified that shortly after the shooting of Mr. Parker, petitioner voluntarily came to the police station. At 8:25 p.m., she signed a form stating that she had been informed of her constitutional rights to remain silent and to be advised by counsel; the form further stated that she did not desire to have counsel present and was freely responding to police interrogation. Petitioner then made a statement, which Detective Watson described at trial:

> "[s]he told us that she had shot Frank Parker at his house and that they had been having trouble a little over a month. I asked her where the weapon was at and she said she left it at the house. I asked her whose weapon it was and she told me that it was at the house before she ever got there. She said that she walked over to Frank's house and went to the rear door and entered through the kitchen and that she saw Frank and Frank motioned to her in the direction of the bedroom, the rear bedroom, adjacent to the kitchen. And that she went back there and then she went to what I call a junk room, it's got a bed in there and a lot of different little tables and stuff like that, and she said that she got a gun that was on the wall and came back through the bedrooms. Directly from the junk room there is a door that leads to each bedroom. The back bedroom which is kind of a junk room where the weapon was, she came through the first bedroom and a smaller bedroom and then into the third one and then back into the living room. And then she said she went over into the living room where she aimed the gun at Frank Parker and shot it. She said she then left the house, went out through the front door, and went to a friend's house and caught a cab and came to the police station."

R. 29-30. 4/

4/ The trial testimony is summarized rather than quoted verbatim. This Court is familiar with the North Carolina practice of narrating the transcript on appeal. See Bumper v. North Carolina, 391 U.S. 543, 546 n.8 (1968).

A shotgun, a spent shotgun shell, and a live shotgun shell were found in the living room of the Parker residence.

Petitioner took the stand and presented five other witnesses in her defense. She testified that when she arrived at Parker's house on the evening of July 19:

> "I went on around the house and went in the back door. It was not my practice to knock or ring the doorbell. I always go in because I mean I always call it home. He didn't tell me to knock. He don't ever knock at my door and I never knocked at his. I opened the door and went in. And Lucy said, 'There's somebody walking around in your house.' I heard her voice. She was talking on the telephone but she stopped and said, 'Somebody is walking around in your house.' And he got up and come in there, in the kitchen where I was, and he waved for me to go in the back bedroom. I went in the back bedroom and I sat there on the bed and then I jumped right up and I run and grabbed the gun and went right in the room. I went through the bedrooms and in the living room. And that's when I fired. But I didn't want to kill him. I don't remember pulling the trigger. It was so fast and I got upset. I don't really know exactly what happened. I saw Lucy. She and Frank were sitting on the couch.
>
> . . . .
>
> I did not intend to kill Frank Parker. I loved Frank very much. I wouldn't hurt him if I knew it. I don't know whether I told him to get up or not. I think I said, 'Get up.' I was upset and I think I did.
>
> . . . .
>
> I said I didn't intend to hurt or kill Frank Parker. I got the shotgun. I was upset and wasn't intending to kill him. I was intending to maybe to scare him. I don't know. But I wasn't intending to kill him. I don't recall even pointing that gun. I recall him falling back. That was because I shot him."

R. 51-52, 57.

During the selection of petitioner's jury, the veniremen were examined concerning conscientious and religious scruples against the death penalty. Eighteen veniremen were excluded by the State for cause on account of such scruples. The voir dire examination of these jurors was not recorded. See pp. 12-21, infra.

At the conclusion of the evidence, the court instructed the jury that it could return a verdict of first degree murder, second degree murder or not guilty. The jury found petitioner guilty of first degree murder, and the court thereupon sentenced her to die. On September 30, 1974, the Supreme Court of North Carolina affirmed petitioner's conviction and sentence of death, with three justices dissenting in regard to the death penalty. On January 9, 1975, Chief Justice Susie Sharp stayed execution of the judgment in order to allow a petition for a writ of certiorari to be filed in this Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner's Grouping of Exceptions and Assignments of Error in the Record on Appeal assigned as error the death sentence in this case because "[t]he imposition and carrying out of the death penalty in this case would constitute cruel and unusual punishment in violation of . . . the Eighth and Fourteenth Amendments to the Constitution of the United States." (Assignment of Error No. VIII, R. 89). The Supreme Court of North Carolina rejected this contention on the merits, citing its decisions in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Barber,

278 N.C. 268, 179 S.E.2d 404 (1971); and State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971).[5] 210 S.E.2d at 414 (App. A, infra at 8a.

2. Petitioner's Grouping of Exceptions and Assignments of Error in the Record on Appeal assigned as error the exclusion for cause of eighteen veniremen on account of their conscientious opposition to capital punishment on the grounds that:

> "A. [petitioner] . . . was denied a fair, impartial and representative jury by the exclusion of those prospective jurors with scruples against the imposition of capital punishment in violation of the Sixth and Fourteenth Amendments to the United States Constitution;

5/ A dissenting opinion stated:

> "BOBBITT, C.J. and HIGGINS and SHARP, JJ., dissent as to the death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, 284 N.C. 625, 666, 202 S.E.2d 721, 747 (1974), the homicide involved herein having been committed in July 1973, that is, in the period between 18 January 1973, the date State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, was decided, and 8 April 1974, the date N.C. Sess.Laws, Ch. 1201 (1973), which rewrote G.S. § 14-21 [sic], became effective."

210 S.E.2d at 414 (App. A, infra, at 8a).

> B. Equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution was denied when that class of prospective jurors comprised of those with scruples against capital punishment was prevented from sitting as jurors in this case ...."

(Assignment of Error No. I, R. 85). The Supreme Court of North Carolina overruled this assignment of error, stating that these "contentions have been repeatedly overruled by this Court and so recently discussed that it would serve no useful purpose to re-examine them here. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974). See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)." 210 S.E.2d at 411 (App. A, infra, at 5a).

3. Petitioner's Grouping of Exceptions and Assignments of Error in the Record on Appeal assigned as error the State's failure to make an adequate recording of the voir dire testimony of the eighteen veniremen excluded for cause on the basis of their conscientious scruples against capital punishment:

> "The [petitioner's] . . . rights as protected by the Sixth and Fourteenth Amendments and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution were violated by the exclusion of jurors who opposed capital punishment, in that: . . . .

> C. The State may not impose the death penalty where, as here, a full transcript of the proceedings was not made showing the exact questions put to and answers by those eighteen (18) prospective jurors who were excused by the court because of their scruples concerning the death penalty."

(Assignment of Error No. I, R. 85). The Supreme Court of North Carolina rejected this claim without discussion, ruling that "[petitioner's] . . . assignment of error No. 1 is overruled." 210 S.E.2d at 411 (App. A., infra, at 5a).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF EIGHTEEN VENIREMEN ON THE GROUND OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY DEPRIVING PETITIONER OF A REPRESENTATIVE JURY SELECTED FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" sections, respectively, of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974), at 11-51 (attached as Appendix B), and of the Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975), at 72-78 (attached as Appendix C).

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A TRANSCRIPT BE MADE OF THE VOIR DIRE EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE, SO AS TO ASSURE A RECORD OF SUFFICIENT COMPLETENESS TO PRESERVE A CAPITAL DEFENDANT'S RIGHTS AGAINST UNCONSTITUTIONAL METHODS OF JURY SELECTION SUCH AS THOSE CONDEMNED BY WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

At petitioner's trial on a capital charge, no recording was made of the voir dire examination of prospective jurors,[6] although the jurors were interrogated concerning conscientious and religious scruples against capital punishment. Eighteen veniremen were excluded for cause on the basis of their answers to these questions. The record contains the following entry:

> "OBJECTION TO METHOD OF JURY SELECTION
>
> COURT: Let the record show that during the State's examination of the jurors on voir dire as to their fitness and competency to serve as jurors on this case, the solicitor asked the jurors various questions concerning their views and feelings about sitting as a juror on this case wherein the defendant was charged with the crime of First Degree Murder and about a verdict which would result in the death penalty being imposed upon defendant if a verdict of guilty of First Degree should be returned.
>
> Let the record further show that the solicitor was allowed to challenge for cause 18 prospective jurors after said 18 jurors stated on voir dire that he or she would not under any circumstances, regardless of the evidence, consider joining in a verdict the result of which the death penalty would be imposed, but would automatically vote against such a verdict regardless of the evidence and would not even consider such a verdict in his or her deliberation of the case.
>
> EXCEPTION NO. 1
>
> The defendant objected to the court allowing

6/ The trial court reporter apparently kept no record of any kind of the voir dire proceedings. "The voir dire on jury selection was not recorded by the Court Reporter." Brief of Appellant at 3, State v. Ward, N. C. Sup. Ct. No. 30 (from Edgecombe County, Spring Term 1974). "The voir dire on jury selection was not recorded by the Court Reporter." Brief of the State at 3, id.

> the State to challenge said jurors for cause on the above grounds for that it placed the defendant in an unequal position because it allowed the State to have unlimited challenges to prospective jurors while the defendant was limited to 14 peremptory excuses of prospective jurors.
> EXCEPTION NO. 2"

R. 4-5. But the trial transcript does not reveal the specific questions asked of these eighteen prospective jurors, or their responses. Petitioner's contention that the Constitution requires some adequate recording and preservation of the voir dire examination of prospective trial jurors in a capital case was rejected sub silentio by the Supreme Court of North Carolina.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court ruled that a death sentence cannot be carried out unless the record makes it "unmistakably clear" and "unambiguous" that veniremen were not improperly excused for general scruples against capital punishment. 391 U.S. at 522 n.21, 515 n.9. See also Boulden v. Holman, 394 U.S. 478, 482 (1969); Maxwell v. Bishop, 393 U.S. 262, 265 (1970); Mathis v. New Jersey, and companion cases, 403 U.S. 946-948 (1971). The Court held that:

> "[i]f the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than [that countenanced by Witherspoon]. . . . the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion."

Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21. The Court has accordingly applied Witherspoon to reverse death sentences where no record of the voir dire examination was made, Mathis v. Alabama, 403 U.S. 946 (1971), rev'g 283 Ala. 308, 216 So.2d 286 (1968), and where the court reporter's voir dire notes were not transcribed and made part of the appellate record.

Funicello v. New Jersey, 403 U.S. 948 (1971), rev'g State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968).

The question which this Court should now resolve is whether any alternative to an actual transcript of voir dire testimony can provide an adequate record for the resolution of a capital defendant's claim that veniremen were excluded on a "broader basis" than that countenanced by Witherspoon. Petitioner contends that the nature of a condemned defendant's Witherspoon claim -- depending as it does on the responses of each juror interrogated and excluded on the voir dire -- clearly establishes "a colorable need for a complete transcript" and that "the burden . . . [is therefore] on the State to show that only a portion of the transcript or an 'alternative . . . '[will] suffice." Mayer v. City of Chicago, 404 U.S. 189, 195 (1971).

The necessity for an actual voir dire transcript to resolve claims that capital trial jurors were improperly excluded because of their sentiments concerning the death penalty has been recognized by a number of courts. See, e.g., Garrison v. Patterson, 405 F.2d 696 (CA10 1969);[7/] United States ex rel.

7/ "The Federal District Court did not have an opportunity to consider the jury voir dire necessary to determine the Sixth Amendment issue raised [the permissibility of excluding for cause jurors with conscientious and religious scruples against the death penalty], nor does the record or transcript available to us contain the voir dire examination. It is necessary to review such a transcript before the court can determine the Sixth Amendment question. We cannot therefore say that the test established by [Witherspoon v. Illinois] has been applied nor can the district court determine whether the principles of the Witherspoon decision were violated.

We therefore remand to the trial court . . . ."

Garrison v. Patterson, supra, 405 F.2d at 698 (footnote omitted).

Weston v. Sigler, 308 F.2d 946, 947 (CA5 1962).[8] Subsequent to Mathis v. Alabama, supra, the Supreme Court of Alabama held that in order to determine whether the requirements of Witherspoon were met, a transcript must be kept of the portion of the voir dire proceedings pertaining to the qualification of jurors concerning capital punishment:

> "[t]his Court is of the opinion that it is implicit in the Witherspoon holding that a full and complete transcript adequate for the purposes of appellate review must contain the proceedings incident to the selection and qualification of the jurors pertaining to capital punishment. Therefore, in order to determine whether the requirements of Witherspoon are met, neither this Court nor the trial courts should give force to any statutory authority, rule of court, or prior decision of this Court which would authorize the omission from the transcript of that portion of the proceedings pertaining to the qualification of jurors concerning capital punishment."

Edwards v. State, 287 Ala. 588, 253 So.2d 513, 520 (1971).[9]

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8 / See also State v. Pinkney, Crim. No. 2490 (Cir. Ct. of Palm Beach, Fla., July 9, 1971): "Justice requires that the failure to properly record the proceedings be weighed against the State of Florida, and not against the indigent defendant."

9 / In Liddell v. State, 287 Ala. 299, 251 So.2d 601, 612 (1971), the Alabama Supreme Court reemphasized its requirement that "[t]he trial court should . . . make certain that the court reporter takes full notes from which a transcription can be made of the examination of the jurors relative to qualifying them." See also Beecher v. State, 288 Ala. 1, 256 So.2d 154; 165-166 (1971), rev'd on other grounds, 408 U.S. 234 (1972). Strong v. State, 47 Ala. App. 238, 252 So.2d 659 (1971). Pilkington v. State, 46 Ala. App. 716, 248 So.2d 755, cert. denied, 287 Ala. 739, 248 So.2d 757 (1971).

Similarly, the Supreme Court of Georgia has recently reversed a death sentence on the federal ground that no transcript was kept of the voir dire examination of prospective jurors:

> "In Funicello [v. New Jersey, 403 U.S. 948 (1971)], the petitioner sought post-conviction relief relative to the imposition of the death penalty. His attack was based on the Witherspoon issue and on the double sentencing standard issue involved in Jackson v. United States, 390 US 510 [1968]. . . . The New Jersey Supreme Court has denied the requested relief, Funicello v. New Jersey, 52 N.J. 263, 245 A2d 181, 196, and had said: "As to [petitioner], the [Witherspoon] issue is asserted in abstract terms, without any reference to the voir dire examination. In fact, no transcript of the voir dire was submitted either on the review or on direct appeal from the judgment of conviction, and so far as we have been able to learn, the testimony of the veniremen was never transcribed." In its memorandum opinion the United States Supreme Court reversed the judgment insofar as it imposed the death sentence and remanded for further proceedings, citing Witherspoon, Boulden and Maxwell, supra, as well as Jackson v. Georgia, 408 US 238 . . . .
>
> A post-trial examination of lawyers and court officials, or of excluded veniremen, would not be a satisfactory means for this court to perform its review function.
>
> We hold that failure to record the Witherspoon voir dire in a case in which the sentence of death is imposed, is reversible error. We therefore reverse the judgment in this case insofar as it imposed the death sentence and remand it to the trial court for a new trial on the question of the sentence."

Owens v. State, Ga. Sup. Ct. No. 29381 slip op. at 4-5 (Feb. 12, 1975)(attached as Appendix D, infra).[10/]

10/ In another recent capital case, where the voir dire examination had been recorded but not transcribed, the Supreme Court of Georgia ordered a transcription so that it could consider appellant's Witherspoon objections: "the United States Supreme Court appears to have held [in Funicello v. New Jersey, 403 U.S. 948 (1971)] that a transcript of the voir dire proceedings must be included in the record in cases where the death penalty is imposed." Ross v. State, __Ga.__, 211 S.E.2d 356, 360 (1974), petn. for cert. filed, Mar. 17, 1975 (No. 74-6207).

A trial court's dictation of a two-paragraph abstract summary of the questions and answers of a dozen and a half veniremen on voir dire, as a basis for justifying their exclusions for cause on the ground of conscientious or religious scruples against the death penalty, will not pass muster under Witherspoon for a number of reasons.

First, such a summary ignores the crucial features of a Witherspoon claim:

> "[t]he critical question [. . .] is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood -- or misunderstood -- by prospective jurors. Any 'layman . . . [might] say he has scruples if he is somewhat unhappy about death sentences . . . . [Thus] a general question [. . .] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases.'"

Witherspoon v. Illinois, supra, at 515 n.9. A general summary of questions and answers does not reveal the views of each individual juror with the specificity necessary to make it "unmistakably clear" id. at 522 n.21, that he was properly excluded for cause, because such a summary does not convey the nuances and uncertainties which well might qualify an affirmative answer. This Court has vacated death sentences

for Witherspoon error, despite the finding of a state appellate court that the "atmosphere" of voir dire was consistent with Witherspoon standards, Speck v. Illinois, 403 U.S. 946, rev'g 41 Ill.2d 177, 242 N.E.2d 208 (1968), that a trial judge had conscientiously tried to follow Witherspoon, Pruett v. Ohio, 403 U.S. 946 (1971), rev'g 18 Ohio St.2d 167, 248 N.E.2d 605 (1969), and that the "spirit" of Witherspoon was not violated, Aiken v. Washington, 403 U.S. 946, rev'g 75 Wash. 421, 452 P.2d 232 (1969).

Second, the summary appearing in the record here does not clearly indicate whether the excluded veniremen were properly instructed as to their duty to subordinate their personal views to the commands of the law as explained by the court. As the Court declared in Boulden v. Holman, 394 U.S. 478, 483-484 (1969): "[i]t is entirely possible that a person who has 'a fixed opinion against' or who does not believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." A veniremen must be instructed that the law requires him to "subordinate his personal views to what he perceive[s] to be his duty to abide by his oath as a juror and to obey the law of the State," Witherspoon v. Illinois, supra, 391 U.S. at 514-515 n.7. The record as it now stands is utterly unilluminating as to any excluded venireman's conception of his proper duty as a juror.

Third, the opacity of this record effectively insulates from appellate review the trial court's determination that no Witherspoon error was committed. Although an appeal has not been held to be a necessary part of due process, see Ross v. Moffit, __U.S.__, 41 L.Ed.2d 341 (1974); Griffin v. Illinois, 351 U.S. 12, 18 (1956); In re Gault, 387 U.S. 1, 57-58 (1967), where it is provided, it cannot be unreasonably or arbitrarily limited. Douglas v. California, 372 U.S. 353, 358 (1963); Lane v. Brown, 372 U.S. 477, 481 (1963). See also Eskridge v. Washington State Board, 357 U.S. 214, 216 (1958); Draper v. Washington, 372 U.S. 487, 498-499 (1963). The procedure followed here effectively places in the hands of the trial court the sole responsibility for judging the constitutional propriety of its own rulings on the exclusion of jurors. All too frequently a lower court's conclusory judgment that it has complied with Witherspoon has been reversed on appeal. See, e.g., Duplessis v. Louisiana, 403 U.S. 946 (1971), rev'g State v. Hudson, 253 La. 992, 221 So.2d 484 (1969).

Fourth, the requirement that the voir dire of prospective jurors be recorded and transcribed imposes no significant burden on the State, since voir dire in North Carolina is frequently recorded and transcribed with the remainder of the trial testimony. Capital defendants are often indigent and thus unable to hire a reporter to record and transcribe the voir dire hearing. Furthermore, six years of experience with Witherspoon has surely afforded the States sufficient experience with Witherspoon issues to give notice of the importance of a complete transcript.

Finally, since by definition the Witherspoon issue involves a matter of life and death, any doubts as to the legitimacy and sufficiency of a practice that affects the ability of a condemned defendant adequately to raise an issue which might save his life must be resolved in favor of the condemned defendant. "What is at stake for an accused facing death . . . demands the utmost solicitude of which courts are capable." Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). Such a demand is consistent with the frequently expressed principle that courts treat cases involving the death penalty with extraordinary care to insure that all proper procedures have been followed and that no error has occurred in the trial. Furman v. Georgia, 408 U.S. 239, 287 n.34 (1972)(Brennan J. concurring); Williams v. Georgia, 349 U.S. 375, 391 (1955); Stein v. New York, 346 U.S. 156, 196 (1953); Reid v. Covert, 354 U.S. 1, 77 (1957)(Harlan J. concurring); Andres v. United States, 333 U.S. 740, 752 (1948). "The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society." Marion v. Beto, 434 F.2d 29, 32 (CA5 1971); therefore, "doubts concerning the ability of a veniremen to subordinate his personal views to his oath as a juror to obey the law of the state should be resolved against exclusion." Id. at 31. Placing the burden of providing and preserving a record of voir dire testimony on the State is clearly warranted by the nature of the right at stake - which is no less than life itself - and by the respective positions of the parties.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX A

State v. Ward, ___ N.C. ___, 210 S.E.2d 407 (1974).

to the screams of the children and demanded to know what he was doing with Kathy, defendant said, "I am just taking her to show her where somebody broke in." The broken lock from the door was found at the same place where defendant was apprehended by Kathy's father. The only legitimate, logical inference to be drawn from these facts is that defendant knew the lock was broken (whether he did it or not) and was dragging the child into the building to assault her. The majority now decides that Kathy was neither falsely imprisoned nor kidnapped because "the entire incident occurred during the seconds it took defendant to pull Kathy a distance of 80 to 90 feet, at a time when Larry and Sue were screaming and running for readily available help and Kathy was resisting by word and by deed defendant's efforts to make her go along with him. To constitute the crime of kidnapping the defendant (1) must have falsely imprisoned his victim by acquiring complete dominion and control over him for some appreciable period of time, and (2) must have carried him beyond the immediate vicinity of the place of such false imprisonment. We hold the evidence, when considered in the light most favorable to the State, insufficient to establish either the false imprisonment or the carrying away element of the felony of kidnapping." Thus, in *Dix* the victim was carried 62 feet but he was not "carried away enough" to constitute kidnapping. Here, the victim was dragged 80 to 90 feet but the majority holds she was not "carried away enough." Moreover, additional requisites are now prescribed. Unless the accused (1) acquires *complete dominion and control* over his victim (2) for some *appreciable period* of time, and (3) carries the victim beyond *the immediate vicinity* of the place where he acquired complete dominion and control, he is not guilty of kidnapping. Our next duty, in cases to come, will require us to define the meaning of "complete dominion and control," "appreciable period of time," and "immediate vicinity." These definitions will only dig up more snakes.

Established law is always left more indefinite, more uncertain, and more unenforceable when courts begin to tamper with it. Such is the case here. The majority decision is the first offspring of *Dix*. There will be others; and the law of kidnapping will become, if in fact it has not already, a jumble which officers and prosecutors can neither understand nor enforce. Meter sticks and measuring tapes are strange but necessary aids in determining whether a kidnapping has been committed. Perhaps divining rods are next.

For the reasons stated here and in my dissent in State v. Dix, I respectfully dissent from that part of the majority opinion which holds that the evidence is insufficient to establish either false imprisonment or kidnapping. See State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971), where those two crimes are defined and distinguished, each from the other.

HIGGINS, J., joins in this dissenting opinion.

STATE of North Carolina

v.

Mamie Lee WARD.

No. 88.

Supreme Court of North Carolina.

Dec. 30, 1974.

Defendant was tried and convicted in the Superior Court, Edgecombe County, Joshua S. James, J., of first-degree murder, and appealed. The Supreme Court, Moore, J., held that allowing solicitor to challenge for cause 18 prospective jurors who stated on voir dire that he or she would not under any circumstances, regardless of evidence,

consider joining in a verdict on which the death penalty would be imposed did not deprive defendant of a fair trial by impartial jury, or of due process or equal protection. Where defendant by her own statement indicated that she had intentionally discharged a gun under circumstances naturally dangerous to human life, the court, under evidence, properly omitted any instructions on voluntary or involuntary manslaughter.

No error.

Bobbitt, C. J., and Higgins and Sharp, JJ., dissented as to the death sentence and voted to remand for imposition of sentence of life imprisonment.

1. Constitutional Law ⇐250.2(4), 267
Jury ⇐33(5)

Allowing solicitor to challenge for cause 18 prospective jurors who stated on voir dire that he or she would not under any circumstances, regardless of evidence, consider joining in verdict on which death penalty would be imposed did not deprive defendant of fair trial by impartial jury, or of due process or equal protection. U.S.C.A. Const. Amends. 6, 14; G.S. §§ 7A-27(a), 15-144.

2. Jury ⇐131(13)

Jury was not confused as to its proper role because prospective jurors were told that crime for which defendant was being tried carried mandatory death penalty. G.S. § 15-144; U.S.C.A.Const. Amends. 6, 14.

3. Criminal Law ⇐789(4)

Court's charge on reasonable doubt, although it first stated that "a reasonable doubt is not ten different things" was not erroneous.

4. Criminal Law ⇐855(1)

In short, simple trial, no error was shown in fact that three jurors took notes, and took them into the jury room for use during deliberation.

5. Homicide ⇐309(3)

In homicide prosecution wherein defendant by her own statement indicated that she had intentionally discharged gun under circumstances naturally dangerous to human life, court, under evidence, properly omitted any instructions on voluntary or involuntary manslaughter.

6. Homicide ⇐43

Where defendant and deceased were not husband and wife and defendant found deceased, who had been a boyfriend of three years, entertaining her rival in the den of his home on an evening when he had invited defendant to visit him, and deceased, in order to avoid confrontation between the two women, silently waved defendant into back bedroom and then resumed his conversation with defendant's rival as if defendant were not in the house, such facts did not constitute adequate cause for passion which would mitigate killing to manslaughter.

7. Homicide ⇐47

When one spouse kills other in heat of passion engendered by discovery of deceased and paramour in very act of intercourse, or under circumstances clearly indicating that act has just been completed or was severely proximate, and killing follows immediately, it is manslaughter; but mere suspicion, belief or knowledge of past adultery between the two will not change character of homicide from murder to manslaughter. G.S. § 15-144.

8. Homicide ⇐39, 42

In distinguishing between murder and manslaughter, law extends its indulgence to transport of passion justly excited and to acts done before reason has time to subdue it, but law does not indulge revenge or malice, no matter how great the injury or grave the insult which first gave it origin. G.S. § 15-144.

9. Homicide ⇐42

Court would not apply exculpatory features of crime passional to killing of a mis-

tress, regardless of duration of relationship, in distinguishing between murder and manslaughter.

10. Criminal Law ⇐1213

Death penalty does not constitute cruel and unusual punishment. G.S. § 15-144; U.S.C.A.Const. Amend. 8.

Appeal by defendant under G.S. § 7A-27(a) from James, J., 17 September 1973 Criminal Session of Edgecombe, docketed and argued at the Spring Term 1974 as Case No. 30.

Defendant was tried and convicted of first degree murder upon an indictment, drawn under G.S. § 15-144, which charged that on 19 July 1973 she "did kill and murder Frank Parker."

The State's evidence tends to show: About 8:00 p. m. on 19 July 1973 Frank Parker was seated in the den of his residence talking to Lucy Taylor, his girl friend of five months. Lucy had been there approximately thirty minutes when the phone rang. She answered it by saying, "Parker's residence." The person calling immediately hung up without speaking. Approximately ten minutes later, as she and Parker were talking, Lucy heard someone leave the front porch and walk around to the back door. She heard the back doorknob turn but did not hear anyone come inside. However, she told Parker he should see who was coming in. He got up, moved to a spot in the den from which he could see both the front and the back door, and reported he saw no one; that if "somebody was out there they had nothing to do but knock." He then sat back down and, at Lucy's request, dialed a telephone number for her.

Lucy had been talking on the phone a minute or two when the front door opened, and defendant appeared with "a shotgun lifted at an angle ready to fire." She fired the gun toward Frank Parker, who was "sitting relaxed on the couch." He was hit on the chin. As defendant broke the gun open and attempted to reload it, Lucy fled from the room and jumped out the back window. In her opinion, Parker had been fatally wounded. He said nothing before or after he was shot.

In response to a call, received about 8:15 p. m., William L. Melton, a police officer of the City of Rocky Mount, went to Parker's home. Upon entering the living room through the front door he observed a live shotgun shell on the floor in direct line with the door. To the left, toward the door into the den, he saw a spent shell on the floor. In the den he found a black male sitting on the couch, a large amount of blood about his person, and a hole to the right of the center of his face about his mouth. In Melton's opinion the man was dead at the time. There was no living person in the house at the time Melton arrived. In the middle bedroom he saw three rifles or shotguns over in the corner.

At 8:25 p. m., S. F. Watson, detective sergeant of the Rocky Mount Police Department interviewed defendant at the police station. After she had been fully advised of all her constitutional rights, and had signed the standard waiver of rights, she told the officers that she had shot Frank Parker at his house. In answer to Watson's questions she made the statement summarized below.

Defendant and Frank had been having trouble a little over a month. She walked over to Frank's house, went to the rear door, and entered through the kitchen. Frank saw her and motioned her into the rear bedroom, adjacent to the kitchen. From there she went into the adjoining bedroom where Frank kept his guns. She got a gun from a rack on the wall and then walked through the bedrooms into the living room. There she aimed the gun at Frank Parker and shot it. She then left the house through the front door, called a cab from a friend's house and came to the police station.

After she made the foregoing statement she told the officers that she was upset and would like time to think before

answering any more questions. The interrogation ended, and Watson accompanied Detective Mullen to Parker's home, where they joined Officer Melton. They entered the living room and found a single-barrel shotgun in the corner just right of the door. The gun smelled of fresh gun powder and was about three feet from the spent shell on the living room floor.

The following morning Dr. F. W. Avery, a pathologist, performed an autopsy on Parker's body. He testified that Parker's death resulted from a hemorrhage secondary to a gunshot wound in the face.

Defendant offered evidence which tended to show: For approximately two and a half years prior to May 1973, defendant and Frank Parker had lived together at 320 Olive Street. Defendant kept her personal possessions at Parker's house, shared living expenses with him, and cooked his meals. During this period they had taken a vacation bus tour to Canada, and on Labor Day 1972 they had attended a family reunion of defendant's relatives in Hampton, Virginia. In May 1973 defendant's daughter, Brenda Ward, returned to Rocky Mount from New Jersey with a baby, and defendant moved into an apartment at 529 Gay Street with her.

William R. Gaynor, a cab driver, testified that sometime after 6:00 p. m. on 19 July 1973 he picked up defendant at the corner of Middle and Gay Streets and took her to 320 Olive Street. At that time she appeared normal to him and had no gun as far as he could see. He thought he was taking her home. He had "picked her up and taken her there before."

Defendant's testimony, summarized except when quoted, tends to show: She is 52 years old and, on 19 July 1973, was employed as a cook at the Carolina Cafe. She has been separated from her husband for 19 years. Her three children were grown. She had known Frank Parker about twenty years, and they had lived together for three. They broke up housekeeping on 19 July 1973 because her daughter returned to Rocky Mount with a baby, and she decided that it was best for her to be with them. When she and Frank discussed the move he said to her, "Well, it won't be no difference between us, baby. You come to see me and I can go see you. You will still be home." Until her daughter came home defendant slept every night at 320 Olive Street, but thereafter she "went backwards and forwards." She "would go over there and spend the night and sometimes . . . stay half the night." She saw Frank just about every day; he was her "boy-friend." When he got off work at 6:00 he would stop by to see her. On the afternoon of July 18th he had stopped by and asked her to come to his house. The next day, about 8:00 p. m. (traveling in a cab), she went to Frank's house just like any other night. As usual she went in the back door without knocking and entered the kitchen. She heard Lucy talking on the telephone and heard her step to tell Frank that somebody was walking in his house. Frank came into the kitchen and, without a word, waved defendant into the back bedroom.

In material part, defendant's account of subsequent events is as follows: "I went in the back bedroom and I sat there on the bed and then I jumped right up and I run and grabbed the gun and went right in the room. I went through the bedrooms and in the living room. And that's when I fired. But I didn't want to kill him. It was so fast and I got upset. I don't really know exactly what happened. I saw Lucy. She and Frank were sitting on the couch. . . . When Frank come in there and waved for me to go in the back bedroom, I got upset and I couldn't think. It was two guns on the rack and I just reached right up and got it. . . . I don't know where I got the shells. I don't remember even loading the gun. . . . This was a man I loved. A man I did not want to hurt. . . . I really don't know what I was intending to do when I reached up and got the shotgun. I can't express what I was thinking. I was not intending to shoot him. . . . I saw him fall back after I had fired the shotgun.

I just walked out the door. . . called a cab and went to the police station. . . . I went to the police station to give up. I told them that I had shot him."

Defendant testified that she had previously met Lucy Taylor; that she had seen her at Frank's house three times. She had come when defendant was there. Defendant and Frank had "talked about Lucy because she called a lot."

The court instructed the jury to return one of three verdicts: Guilty of murder in the first degree, guilty of murder in the second degree, or not guilty. The verdict was "Guilty of murder in the first degree." The court imposed the sentence of death and defendant appealed.

Robert Morgan, Atty. Gen., and John R. B. Matthis, Asst. Atty. Gen., Raleigh, for the State.

Chambers, Stein, Ferguson & Lanning by Adam Stein, Chapel Hill, and Howard A. Knox, Jr., Rocky Mount, for defendant appellant.

MOORE, Justice.

[1, 2] The record discloses that in the selection of the jury "the solicitor was allowed to challenge for cause 18 prospective jurors after said 18 jurors stated on voir dire that he or she would not under any circumstances, regardless of the evidence, consider joining in a verdict the result of which the death penalty would be imposed, but would automatically vote against such a verdict regardless of the evidence and would not even consider such a verdict in his or her deliberation of the case." Defendant's first assignment of error is that the exercise of these 18 challenges by the State denied her (1) the fair trial by an impartial jury guaranteed by U.S.Const. Amend. VI, and (2) due process and the equal protection of the laws guaranteed by U.S.Const. Amend. XIV.

The foregoing contentions have been repeatedly overruled by this Court and so recently discussed that it would serve no useful purpose to re-examine them here. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 841 (1974); State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974); State v. Brewer, 285 N.C. 42, 203 S.E.2d 38 (1974). *See* Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

With reference to the voir dire examination of the eighteen jurors whom the State challenged for cause, defendant makes the novel argument that when prospective jurors are told the crime for which the defendant is being tried carries a mandatory death penalty, they are given information which is irrelevant to the jury's function, "thereby confusing it as to its proper role." It is inconceivable to us that a jury could try a capital case without finding out it was doing so. Certainly, any effort to keep this information from the jury could only result in confusion and resentment. A defendant, charged with a capital crime and convicted by a jury which did not know the death penalty was involved, would surely contend that he had been prejudiced by its ignorance. Jurors trying a capital case can reasonably be counted on to weigh the evidence with the greatest care and to require proof of the defendant's guilt beyond a reasonable doubt, and assumedly counsel for defendant can be counted on to point out to the jury the consequences of their failure to do so. *See* State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Carey, 285 N.C. 509, 206 S.E.2d 222 (1974).

Defendant's assignment of error No. 1 is overruled.

Defendant's third assignment of error is to that portion of the judge's charge in which he defined reasonable doubt as follows:

"You have heard during the trial of this case the term 'reasonable doubt' said many times, so the question arises, what kind of a doubt is a reasonable doubt? You must have some understanding and knowledge of what reasonable doubt is before you can properly perform your duty as jurors in this case. And so I instruct you that a reasona-

ble doubt is not just any kind of doubt; it is not just a possible, imaginary or fanciful doubt; it is not a doubt which might be prompted or suggested to your mind by sympathy for the defendant or her people or family; it is not a doubt which might be born of a merciful inclination or disposition on your part to permit the defendant to escape the penalty of the law; it is not a doubt which originates in your mind by some ingenious or illogical twist or misconstruction of the evidence. Your mind and judgment should tell you that a doubt would not be reasonable if it was founded upon or suggested by any of these considerations. On the contrary, a reasonable doubt is a sane, sensible, honest doubt based upon reason and common sense. It is an actual, honest and substantial misgiving or doubt of guilt or question of guilt which reasonably arises from the evidence or from the lack of evidence or the insufficiency of the evidence, and a reasonable doubt exists and exists only when the evidence or proof honestly fails to convince or satisfy your judgment and reason to a moral certainty of the guilt of the accused. Thus, if the evidence or proof is such that after due consideration of all of the evidence you are fully convinced and entirely satisfied, not to an absolute certainty but to a moral certainty, of the truth of the charge, then you would be satisfied beyond a reasonable doubt and it would be your duty to return a verdict of guilty. On the other hand, if after weighing and considering all of the evidence, you have an actual, honest, substantial misgiving or question as to guilt, a sane, rational doubt based on reason and common sense, then you would have a reasonable doubt, and it would be your duty to give the defendant the benefit of that doubt and to return a verdict of not guilty."

[3] Defendant contends that by first stating "that a reasonable doubt is *not* ten different things" the court overemphasized its negative aspects and left the jury with the impression "that a reasonable doubt is a rare thing indeed, if it ever exists at all." Conceding *arguendo* that the judge overdefined reasonable doubt, it appears nevertheless that he did give equal stress to the affirmative aspects of the definition. We cannot believe that the jury was misled or confused. Notwithstanding, we repeat what this Court has said a number of times, "The words 'reasonable doubt,' in themselves, are about as near self-explanatory as any explanation that can be made of them." State v. Wilcox, 132 N.C. 1129, 1137, 44 S.E. 625, 631 (1903); State v. Phillip, 261 N.C. 263, 269, 134 S.E.2d 386, 391 (1964). In any event we again recommend to the trial judge the shorter, approved definitions, appearing in numerous decisions of this Court. *See* State v. Hammonds, 241 N.C. 226, 85 S.E.2d 133 (1954). Defendant's third assignment of error is overruled.

[4] Defendant's assignment of error No. 7 is that the court erred in denying her motion to set aside the verdict because three jurors had taken notes into the jury room for use during their deliberations. When this motion was made the judge immediately and carefully examined the jury. His examination revealed that two jurors had noted the names of the witnesses who had testified and had made some notes during the charge. A third juror had noted the court's definitions of first and second degree murder. Counsel for defendant, who said they had been unaware of the note-taking, argued that it raised such serious questions "concerning the integrity of the jury's process of deliberation" as to invalidate the verdict. We find nothing in the record which supports this contention.

Since defense counsel were unaware that the three jurors were taking notes, it is not to be assumed that their writing distracted the attention of the other jurors from the testimony. As defendant states in her brief, "The trial was both short and simple"; so it is quite unlikely that the three jurors' notes gave them a position of undue influence in the jury's deliberations. As Chief Justice Parker said in State v. Sheldi, 274 N.C. 95, 101, 161 S.E.2d 477, 484 (1968), "Most authorities in this Nation take the

view that the making and use of trial notes by the jury is not misconduct but is proper, and may even be desirable, where it is unattended by undue consumption of time. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 231, cert. den. 377 U.S. 978, 84 S.Ct. 1884, 12 L.Ed.2d 747; Cowles v. Hayes, 71 N.C. 230; Annot. in 14 A.L.R.3d 231 *et seq.* entitled 'Taking and Use of Trial Notes by Jury'; 89 C.J.S. Trial § 456; 23A C.J.S. Criminal Law § 1567 . . . ." *See* 75 Am.Jur.2d, Trial § 963 (1974). Assignment of error No. 7 is overruled.

[5] Defendant stresses most strenuously her assignment of error No. 6, that the court erred by failing to instruct the jury on the lesser offenses of voluntary and involuntary manslaughter. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." State v. Hicks, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954). This assignment, therefore, presents the question whether the record contains any evidence which would support a verdict of either involuntary or voluntary manslaughter.

Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence. State v. Foust, 258 N.C. 253, 128 S.E.2d 889 (1963). *See* State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971). Clearly the evidence did not justify a charge on involuntary manslaughter. Defendant makes no contention that the gun was discharged accidently. On the contrary she testified, "I went in the back bedroom and I sat there on the bed and then I jumped right up and I run and grabbed the gun and went right in the room. I went through the bedroom and in the living room. *And that's when I fired.* But I didn't want to kill him. . . ." (Emphasis added.) By her own statement defendant intentionally discharged the gun under circumstances naturally dangerous to human life.

It is equally clear that the evidence will not support a verdict of voluntary manslaughter. The killing did not result from the use of excessive force in the exercise of the right of self-defense; nor was it the result of anger suddenly aroused by provocation which the law deems adequate to dethrone reason temporarily and to displace malice. *See* State v. Woods, 278 N.C. 210, 179 S.E.2d 358 (1971); State v. Merrick, 171 N.C. 788, 88 S.E. 501 (1916); State v. Baldwin, 152 N.C. 822, 68 S.E. 118 (1910). *See also* State v. Wrenn, *supra* 279 N.C. at 687, 185 S.E.2d at 136.

The following circumstances aroused the passion upon which defendant relies to reduce the homicide from murder to manslaughter: She found her boyfriend of three years entertaining her rival in the den of his home on an evening when he had invited defendant to visit him. Then, in order to avoid a confrontation between the two women, he had silently waved defendant into a back bedroom and then resumed his conversation with Lucy as if defendant were not in the house.

[6] Defendant and deceased were not husband and wife. However, even had they been lawfully married to each other, his conduct would not, in law, have constituted adequate cause for passion which would mitigate the killing to manslaughter. Defendant did not find Parker and Lucy in the act of adultery. On the contrary, both were fully clothed, sitting on the sofa in the den, and Lucy had been talking on the phone at the time defendant entered the house.

[7, 8] When one spouse kills the other in a heat of passion engendered by the discovery of the deceased and a paramour in the very act of intercourse, or under circumstances clearly indicating that the act had just been completed, or was "severely

proximate," and the killing follows immediately, it is manslaughter. However, a mere suspicion, belief, or knowledge of past adultery between the two will not change the character of the homicide from murder to manslaughter. The law extends its indulgence to a transport of passion justly excited and to acts done before reason has time to subdue it; the law does not indulge revenge or malice, no matter how great the injury or grave the insult which first gave it origin. State v. John, 30 N.C. 330 (1848); State v. Samuel, 48 N.C. 74 (1855); State v. Avery, 64 N.C. 609 (1870); State v. Harman, 78 N.C. 515 (1878). See State v. Holdsclaw, 180 N.C. 731, 105 S.E. 181 (1920); 40 C.J.S. Homicide § 49 (1944); 40 Am.Jur.2d, Homicide § 65 (1968).

[9] Defendant argues that where a relationship comparable to that of husband and wife has been of long standing "the rule of mitigation should extend beyond the marital relation" and that "this case comes squarely within the modern view of adequate provocation." In our view the words of Justice English in People v. McDonald, 63 Ill.App.2d 475, 480, 212 N.E.2d 350, 352 (1965) are appropriate here: "In the first place we do not think that the facts in evidence disclose the 'compromising situation' which defendant uses as the base for his argument. Beyond that, however, we are aware of no case which applies the exculpatory features of crime passional to the killing of a mistress, regardless of the duration of the relationship. We will not do so in this case." See Cyrus v. State, 102 Ga. 616, 29 S.E. 917 (1897); 40 C.J.S., Homicide § 49. Defendant's assignment of error No. 6 is overruled.

[10] Defendant's assignment of error No. 8, that the death penalty constitutes cruel and unusual punishment a violation of U.S.Const. Amends. VIII and XIV, has heretofore been decided adversely to defendant's contentions. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Barbar, 278 N.C. 308, 179 S.E.2d 401 (1971); State v. Atkinson, 278 N.C. 168, 179 S.E.2d 416 (1971).

Defendant brought forward nine assignments of error. All have been most carefully considered; none discloses prejudicial error.

No error.

BOBBITT, C. J., and HIGGINS and SHARP, JJ., dissent as to the death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, 284 N.C. 625, 666, 202 S.E.2d 721, 747 (1974), the homicide involved herein having been committed in July 1973, that is, in the period between 18 January 1973, the date State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, was decided, and 8 April 1974, the date N.C. Sess.Laws, Ch. 1201 (1973), which rewrote G.S. § 14-21, became effective.

APPENDIX B

Pages 11-51, Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This case and four contemporary cases[6/] present the question of the constitutionality of the death penalty as that penalty was resurrected inthe State of North Carolina by a four-to-three vote of the North Carolina Supreme Court following Furman v. Georgia, 408 U.S. 238 (1972). A brief review of post-Furman developments relating to the death penalty in the United States generally and in North Carolina particularly sets the question in perspective.

The nearly universal response of state courts in obedience to Furman was to hold that death sentences could no longer be meted out under the capital punishment laws which had been in effect prior to June 29, 1972, and which the Furman decision

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6/ Crowder v. North Carolina, O.T. 1973, No. 73-
Henderson v. North Carolina, O.T. 1973, No. 73-
Jarrette v. North Carolina, O.T. 1973, No. 73-
Noell v. North Carolina, O. T. 1973, No. 73-

of that date declared unconstitutional.[7] Subsequently, statutes

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7/ See, e.g., United States v. Lee, 489 F.2d 1242 (CA DC 1972); United States v. Woods, 484 F.2d 127, 138 (CA4 1973) ("Since the decision in Furman v. Georgia, ... the statute under which defendant was convicted of first degree murder, 18 U.S.C. §111, provides as the only possible sentence imprisonment for life" at 138); United States v. McNally, 485 F.2d 398 (CA8 1973); Hubbard v. State, 290 Ala. 118, 274 So.2d 298 (1973) ("There is no question that Furman has, as of now, eliminated the death penalty from our statute. The elimination of the death penalty does not destroy the entire statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment." 274 So.2d at 300); State v. Endreson, 109 Ariz. 117, 506 P.2d 248 (1973) ("in view of [the Furman ruling] we hold that the death penalty provisions of [the Arizona murder statute] are unconstitutional." 506 P.2d at 254); O'Neal v. State, 253 Ark. 574, 487 S.W. 2d 618 (1972); People v. Murphy, 8 Cal. 3d 349, 105 Cal. Rptr. 138, 503 P.2d 588 (1972); State v. Aillon, ___Conn.___, 295 A.2d 666 (1972); Anderson, et al., v. State, 267 So. 2d 8 (Fla. 1972); Sullivan et al. v. State, 229 Ga. 731, 194 S.E. 2d 411 (1972); People v. Speck, 52 Ill. 2d 284, 287 N.E. 2d 609 (1972) ("The Supreme Court of the United States has now held that a defendant could not be validly sentenced to death under [pre-Furman Illinois capital statutes]." 287 N.E.2d at 700; Adams v. State, ___Ind.___, 284 N.E.2d 757 (1972); State v. Kendel, 212 Kan. 461, 513 P.2d 248 (1973) (". . .court is of the opinion that the death penalty provision of our present statute is constitutionally impermissible. The 1972 Legislature of Kansas considered but failed to enact amendatory legislation." 513 P.2d at 256); Caine and McIntosh v. Commonwealth, 491 S.W.2d 824 (Ky. 1973), cert. den. 414 U.S. 876; State v. Flood, 263 La. 700, 269 So.2d 212 (1972) ("the Furman case has eliminated 'capital offenses' in Louisiana." 269 So.2d at 214); Bartholomey v. State, 267 Md. 175, 297 A.2d 696 (1972); Commonwealth v. LeBlanc, ___Mass.___, 299 N.E.2d 719 (1973); Caples v. State, ___Miss.___, 268 So. 2d 378 (1973) (". . . the harsher penalty of death may not be lawfully imposed. The remaining part of the statute is complete. . . .We hold that because of Furman v. Georgia, the death penalty cannot be inflicted, that the remainder of the statute is valid and the only other punishment for murder is life imprisonment." 268 So.2d at 339-40); State v. Scott, 491 S.W.2d 514 (Mo. 1973) ("The sole and only punishment for first degree murder in this state is now life imprisonment." at 521); State v. Alvarez, No. 27435, Dist. Ct. Lancaster Cty., Neb. Oct. 4, 1972; Walker v. State, 88 Nev. 539, 501 P.2d 651 (1972); State v. Martineau and Nelson, 112 N.H. 278, 293 A.2d 766 (1972); People v. Fitzpatrick, 32 N.Y. 2d 499, 300 N.E. 2d 139 (1973), cert. den. 38 L.Ed. 2d 338, 94 S.C. 354 (1973); State v. Johnson, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972) ("Under [the Furman] holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is now unconstitutional [with possible exceptions not relevant here]." 285 N.E. 2d at 755); Pate v. State, 507 P.2d 915 (Okla. 1973) ("After an exhaustive study of the [Furman] opinions . . . this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as

were enacted in slightly more than half the States (and by the federal government), authorizing the use of the punishment of death in differingly defined categories of cases.[8/] The statutes vary widely in their terms and forms, and consequently vary

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7/ cont'd

the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia," at 916); Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972); Hunter, et al. v. State, ___ Tenn. ___, 496 S.W.2d 900 (1972) ("The effect of [Furman] . . . is to render void the penalty of death as it exists under the statutes of Tennessee." 496 S.W.2d at 902); Lopez v. State, 500 S.W.2d 844 (Tex. Crim. 1973) (". . . we find the inescapable conclusion to be that the holding in Furman and Branch rendered it impermissible under the Constitution of the United States to impose the death penalty under our ten existing statutes." At 846); Wood v. Commonwealth, 213 Va. 346, 192 S.E.2d 808 (1972); State v. Vidal, 82 Wash.2d 94, 508 P.2d 158 (1973) ("The recent case of Furman v. Georgia . . . has the effect of preventing the imposition of the death penalty under the existing statutes of the State of Washington." 508 P.2d at 162).

8/ Some of these new statutes provide that a court or jury must make a separate determination as to whether a defendant should be sentenced to life or death independently of its finding the defendant guilty of a capital crime; conviction of a particular offense does not, therefore, necessarily result in a death sentence. Some of these laws provide a single verdict proceeding, in which the trial judge or jury must return a general verdict finding a defendant guilty of a capital degree of the offense. Del. Code, tit. 11, § 636 (1974), as amended by Del. H.B. No. 429, 127th Gen. Ass. (1974); N.H. Rev. Stat. Ann. § 630:1(I) (1973), as amended by N.H. S.B. 27, Chap. 34, Acts of 1974, N.H. Gen. Ct.; N.Mex. Stat. §§ 40A-2-1, 40A-2-1(A), 40A-29-2 (1974); N.C. Gen. Stat. §§ 14-17, 14-21, as amended by S.B. 157, Chap. 1201, 1973 Sess. Laws (2nd Sess. 1974); Tenn. Code Ann. §§ 39-2402 (as amended by Pub. Chap. 462, Tenn. Laws 1974), 39-3702 (as amended by Pub. Chap. 461, Tenn. Laws 1974) (1974). Others of these statutes provide a unitary proceeding where a jury must return a verdict finding special facts to justify the death sentence. Ind. Code § 10-3401 (1974); Ky. Rev. Stat. Chap. 507, as amended by Ky. H.B. No. 232, Reg. Sess. 1974; La. Rev. Stat. §§ 14:30, 14:42, 14:44, 14:113 (1974); Ia. Code

somewhat in the questions they present regarding their compliance with Furman and with the Eighth and Fourteenth Amendments to

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8/ cont'd

Crim. Proc., Art. 557, 598, 817 (1974); Miss. Code §§ 97-3-19, 97-3-65 (1974), as amended by Miss. S.B. No. 2341, Reg. Sess. 1974; Mont. Code §§ 94-5-102, 94-5-103, 94-5-105, 94-5-304 (as amended by Mont. H.B. No. 643, Mont. Gen. Laws 1974) (1974); Nev. Code § 200.030 (1974); Okla. Stat., tit. 21, §§ 701.1, 701.3, 701.6 (1974); Wyo. Stat. § 6-54 (1974). Among the new laws which provide a bifurcated proceeding to make this separate determination as to sentence, some allow imposition of sentence without any particular finding identified by the legislature as a prerequisite for imposing either a sentence of death or life imprisonment. Ga. Code § 27-2534.1 (1973), as amended by No. 74, Ga. 1973 Sess. Laws at 162-172; Utah Crim. Code §§ 76-3-206, 76-5-202, 76-5-302, 76-3-207 (1974). Others of these bifurcated trial statutes require the imposition of a death sentence when a certain finding is made at the sentencing proceeding; some identify a particular circumstance which justifies imposition of a death sentence. Cal. Penal Code §§ 190, 190.1, 190.2, 209, 219, 4500 (1974); Ill. Code §§ 5-8-1a, 9-1 (1974); Tex. Pen. Code § 19.02 (1974); Tex. Code Crim. Proc., Art. 37.071 (1974); others identify such circumstances but provide that such "aggravating" circumstances may be counterbalanced by the finding of "mitigating" circumstances in some unspecified fashion, Ariz. Rev. Stat. §§ 13-452 - 13-454 (1974; Ark. Code §§ 41-4702 - 41-4711; Fla. Stat. §§ 782.01, 794.01, 792.141 (1974); Neb. Code §§ 28-401, 29-2522, 29-2523, 29-2524 (1974); still others provide formulae for the weighting of "aggravating" against "mitigating" circumstances to determine which defendants shall be sentenced to death. Conn. Gen. Stat. § 53a-45 (1974); Ohio Rev. Code §§ 2929.03, 2929.04 (1974); Pa. Stat., tit. 18, § 4701 (1974), as amended by Pa. H.B. 1060, Act. 46, 1974 Sess.

Another group of statutes provides for the imposition of a death sentence by operation of law pursuant to a jury's or trial judge's conviction of a certain crime. Idaho Code §§ 18-4003, 18-4004 (1974); R.I. Code § 11-23-2 (1974); New York: Ass. Bill 11474, 1974 Sess. Laws.

The following States have not enacted legislation authorizing the death penalty since Furman: Alaska, Alabama, Colorado, Hawaii, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Dakota, Oregon, South Carolina, South Dakota, Virginia, Washington, West Virginia, Wisconsin, Vermont.

the Constitution.[9] It is a fair although gross generalization that, in most States, the new statutes authorize capital punishment for a narrower category of offenses than those that were punishable by death in the same States before Furman. Of the 103 men and women who have been sentenced to die in the United States since June 29, 1972, and who are presently on death row,[10] roughly two-thirds were condemned under the new post-Furman statutes.

Virtually all of the remainder[11] -- 31 men and women, to be

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9/ The first decisions by the highest court of any State affirming death sentences imposed under one of the new post-Furman statutes were handed down in a Georgia murder case, State v. House, Ga. Sup. Ct. No. 28678 (April 4, 1974)(rehearing denied, April 25, 1974); and in a Georgia rape case, State v. Eberheart, Ga. Sup. Ct. No. 28776 (April 30, 1974)(rehearing denied, May 21, 1974). Counsel for Mr. House and Mr. Eberheart (who include some of the counsel for petitioner Dillard) are presently preparing to seek review by this Court of the Georgia Supreme Court's decisions.

10/ We exclude from this computation a number of persons sentenced to death since Furman whose convictions or death sentences have been reversed or vacated on appeal. The 99 figure represents persons presently committed under unreversed and unvacated sentences of death.

11/ Seven persons have been sentenced to die since Furman under the provisions of pre-Furman statutes. The cases of six of these persons (in Massachusetts, Montana, Pennsylvania, and South Carolina) are described in note 14, infra. The remaining case arises under a Virginia statute which the Virginia Supreme Court held distinguishable from the statutes invalidated in Furman. State v. Jefferson, Va. S.C., No. 730370, decided April 22, 1974. A petition for rehearing is presently pending in Jefferson. Should it be denied, counsel for Mr. Jefferson (who are associated with some of the counsel for petitioner Dillard) anticipate that review will be sought in this Court.

exact -- are on death row in North Carolina, where post-Furman developments took a markedly different turn by the margin of a single vote on the North Carolina Supreme Court in the case of State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). Prior to 1947, North Carolina law had required the imposition of the death penalty upon all convictions for the crimes of first-degree murder, rape, first degree burglary, and arson. By enactments of 1947 and 1949, the North Carolina General Assembly provided that, in the case of convictions for any of these four offenses, the jury might spare the defendant's life by a recommendation of life imprisonment. 12/ An unanimous Supreme Court of North Carolina

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12/ The jury was given the power to recommend life imprisonment in arson and burglary cases in 1947, and in murder and rape cases in 1949. We have found no legislative history dealing directly with the 1947 enactment.

The limited legislative history available for the 1949 North Carolina legislative action reflects a clear and considered abandonment of a general mandatory death penalty. As noted in State v. Pugh, 250 N.C. 278, 168 S.E.2d 649, 642 (concurring opinion of Denny, J.), the 1947 General Assembly created a Special Commission for the Improvement of the Administration of Justice. That Commission recommended, inter alia:

> "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder, because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. Our proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes."

[footnote continued]

concluded in Waddell that, as amended in 1947 and 1949 and operative for nearly a quarter-century between 1949 and 1972, the North Carolina statutes inflicting capital punishment for first degree murder, rape, first degree burglary and arson were unconstitutional under Furman. Three Justices of the court therefore would have held that the death penalties provided by North Carolina law on the dates of the Furman and Waddell decisions were constitutionally unenforceable then and thenceforth until (at the least) the enactment of new capital punishment legislation by the General Assembly. But a majority of four Justices

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12/ cont'd.

POPULAR GOVERNMENT (January 1949) (published by the Institute of Government, University of North Carolina, Chapel Hill, North Carolina), p. 13. The North Carolina Supreme Court commented on the legislative intent indicated by the 1949 measures in State v. McMillan, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

> "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning, - a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature.
>
> "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison . . . . No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right."

held that the only portion of North Carolina law invalidated by Furman was the 1949 "recommendation" provision, with the result that (prospectively from the January 18, 1973, date of the Waddell decision) North Carolina law reverted to its pre-1949 state:

> "[T]he effect of the Furman decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death." (State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, 28-29(1973).)

Under these procedures, petitioner and the other 30 persons now inhabiting North Carolina's death row were sentenced to die between the date of Waddell and the date of the enactment of a new North Carolina death penalty statute on April 8, 1974.[13/]

The question presented here is the federal constitutionality of death sentences imposed in North Carolina pursuant to the Waddell procedures and without new legislative authorization after Furman. Most immediately, that question is potentially decisive of the lives of the 31 condemned inmates in the State

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13/ See note 2, supra.

which now has the largest death row population in the Nation. It may also have direct implications for death sentencing in four other States.[14/] Depending, of course, upon the grounds on which this Court elects to consider the question, it may or it may not have implications -- of narrower or broader scope -- for the death penalties enacted by post-Furman legislation.

14/ The only other state appellate court that has dealt with Furman in the fashion of Waddell is the Supreme Court of Delaware, in State v. Dickerson, __Del.__, 298 A.2d 761 (1972). The Dickerson opinion was announced prospectively on November 1, 1972. No capital convictions were returned in the State of Delaware between that date and the dates upon which, successively, (1) a new criminal code enacted before Furman but effective July 1, 1973, came into effect, repealing the statutory provisions upon which Dickerson rested, and (2) the Delaware legislature enacted a post-Furman statute effective March 29, 1974. There is presently pending litigation in the Delaware Supreme Court raising the issues of the effects upon Dickerson of the supervening code and post-Furman enactment. State v. Smith, Del. S.C. No. 52,1974.

Trial courts in Massachusetts and South Carolina have imposed death penalties after Furman under the purported authorization of pre-Furman statutes and in apparent reliance upon the rationale of Waddell and Dickerson. Commonwealth v. Brown, Clinkscales, and Johnson, Superior Ct., Suffolk Co. (Mass.), Nos. 74502-3-4 and 74516-17-18; State v. Speights, Ct. of Gen. Sess., Florence Co. (S.C.), No. 5053. It is also possible that three post-Furman death sentences imposed in Montana and Pennsylvania under pre-Furman legislation rest upon the same rationale, although the trial judges' reasoning in these cases more likely stands upon other grounds. State v. Rhodes & Shields, Mont. S. Ct. Nos. 12596 and 12597; Commonwealth v. Martin, Pa. Sup. Ct., No. 44 (March Term, 1974). All of the cases just mentioned are presently pending in the respective Supreme Courts of the States in which they arise.

A. Evasion of the Furman Decision

The narrowest issue raised is simply whether the majority of the North Carolina Supreme Court in Waddell read Furman correctly and applied Furman permissibly in holding that Furman invalidated only the 1949 "recommendation" provision of North Carolina law, rather than the underlying death penalty. As tortured as that holding may seem -- being the lethal equivalent of a state-court holding that Brown v. Board of Education required the closing of the public schools instead of their desegregation -- it is not entirely unprecedented. Twice in recent years this Court has corrected similar manipulations of state-law severability doctrines designed to emasculate a constitutional decision of the Court forbidding the imposition and carrying out of impermissible death sentences. Funicello v. New Jersey, 403 U.S. 948 (1971) (alternative ground); Thomas v. Leeke, 403 U.S. 948 (1971).

These two cases involved provisions of New Jersey and South Carolina law which allowed capitally-charged defendants to avoid the possibility of a death sentence by pleading non vult (in New Jersey) or guilty (in South Carolina), and thus affronted the rulings in United States v. Jackson, 390 U.S. 570 (1968), and Pope v. United States, 392 U.S. 651 (1968). The South Carolina Supreme Court in Thomas recognized the incompatibility of its statutory guilty-plea scheme with the constitutional principle of Jackson, but held that the result was to invalidate and sever the guilty-plea provision, leaving the death penalty standing. The New Jersey Supreme

Court attempted to distinguish Jackson but held alternatively that, if Jackson did invalidate New Jersey's non vult provision, that provision rather than the death penalty would be rendered inoperative. In both cases, then, the state-court reaction to decisions of this Court invalidating a composite statutory death-sentencing procedure under which unknown numbers of capital defendants had escaped the death penalty while others had unconstitutionally been sentenced (and many sent) to their deaths, was to sever the escape clause, treat it as though it had never existed for constitutional as well as state-law purposes, and condemn those denied its benefits to die. In both cases, this Court declined the gambit.

What a majority of the North Carolina Supreme Court has done here, albeit by a somewhat different mechanism, is much the same thing. During a quarter of a century between enactment of the legislative "recommendation" procedure in 1949 and enactment of a new post-Furman death-sentencing procedure by the North Carolina legislature in 1974, countless men died and others guilty of identical crimes were spared death pursuant to an arbitrary selective procedure which -- as the North Carolina Supreme Court itself has concluded -- falls unmistakably within the ban of Furman. The response of four Justices of that court is to say essentially that, because the persons spared should not have been spared (under an appropriate manipulation of state severability theory), the fact that they were spared is to be disregarded in determining whether the continued application of the pre-Furman North Carolina statutes authorizing capital

punishment would be arbitrary and selective, and hence a constitutionally cruel and unusual punishment, in the wake of Furman. Thirty-one more persons are thus tossed into the death column as opposed to the now closed and hence forgotten column of the spared, upon the capital punishment ledgers of North Carolina since 1949. Whether the particular state-law contrivance by which that calculation is accomplished makes the deaths of these 31 persons any less selective, arbitrary, cruel and unusual in federal constitutional contemplation is, we suggest, an issue that this Court should address, if its Furman decision is to have the vitality and respect that the Supremacy Clause rightly commands.

B. The Lawless Imposition Of Death Penalties

The second issue presented is whether the re-institution of the death penalty which the North Carolina Supreme Court achieved by amputating life from that State's life-or-death sentencing statutes is a result that can constitutionally be effected by any device of judicial decision wholly ungoverned and undirected by legislative action. It is, of course, generally true that the federal Constitution is not concerned with how a State divides it law-making functions between its judicial and legislative organs. But that generalization cannot be permitted to sweep away the fundamental concerns of the Eighth and Fourteenth Amendments against judicial imposition of harsh criminal punishments unauthorized by law and in excess of the penalties provided by "the valid laws of the land." Giaccio v. Pennsylvania, 382 U. S. 399, 403 (1966).

Recent scholarship has underscored that the English Bill of Rights, from which the Eighth Amendment's prohibition of "cruel and unusual punishments" was derived, was in large measure directed toward preventing the exaction of unauthorized penalties. 15/ That

15/ Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). It is true that Granucci also finds that the American Framers imperfectly understood the English background of the cruel-and-unusual-punishment clause, and that they themselves were principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to diminish the scope of a guarantee that they believed basic to their traditions (see 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (1863)), or to reject protections of the citizen long preserved by their English heritage. Indeed, as early as 1635, American settlers had "conceived great danger . . . in regard that . . . magistrates, for want of positive laws, in many cases, might proceed according to their discretions," and had therefore agreed "that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws." WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686, at 5 (1889). It should hardly be surprising that the cruel-and-unusual-punishment clause, like many of the other basic guarantees of the Bill of Rights, is woven of several strands and protects against more than a single evil.

function remains a vital office of the cruel-and-unusual punishment clause today,[16] although it certainly is not the exclusive focus of the clause.[17] As this Court pointed out in Weems v. United States, 217 U. S. 349, 376 (1909), the Framers were eager to assure "that government by the people, instituted by the Constitution, would not imitate the conduct of arbitrary monarchs." The conjunction of the words "cruel" and "unusual" in the Eighth Amendment can hardly be regarded as accidental if one appreciates the relationship, within a basically popular and democratic governmental structure, of the dangers of lawlessness, irregularity, arbitrary selectivity,[18] and cruelty.[19] For, in such a structure, harsh and unsufferable criminal penalties are most likely to spring from devices that evade the rule of law or subvert the ordinary protections afforded by its regularity and generality.

Due Process of Law, too, insures against the imposition of criminal sanctions that are not decreed in strict accordance with the regular course of law.

> "[T]he terms 'due process of law' . . . come to us from the law of England, from which country our jurisprudence in to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.'" Dent v. West Virginia, 129 U. S. 114, 123 (1888).

16/ See Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 STAN L. REV. 838, 855-856 (1972).

17/ See Weems v. United States, 217 U. S. 359 (1909); Robinson v. California, 370 U. S. 660 (1962); Furman v. Georgia, 408 U. S. 238 (1972). And see note 15, supra.

18/ See section I(C), pp. 28-44, infra.

19/ This relationship is developed in Brief for Petitioner, Aikens v. California, 406 U. S. 813 (1972) [No. 68-5027], pp. 13-27, 39-56.

"The essence of [the] . . . principle of legality is limitation on penalization by the State's officials, effected by the prescription and application of specific rules.[20] So rudimentary has this principle been to American notions of Due Process, that unauthorized criminal penalties have rarely been imposed in this country;[21] but, on the rare occasions when they have been examined by this Court, the Court has treated them as self-evidently void to the extent that they exceeded what was authorized by valid legislation. Ex parte Lange, 83 U. S. 163 (1874); Ex parte Mills, 135 U. S. 263 (1890); In re Bonner, 151 U. S. 243 (1894). In this century, the root principle has been most commonly observed in its offshoots: the vagueness doctrine as applied to penalties, Giaccio v. Pennsylvania, 382 U. S. 399 (1966); the lenity principle, Ladner v. United States, 358 U. S. 169 (1958);[22] and this Court's

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20/ HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).

21/ But see Ashton v. Kentucky, 384 U. S. 195 (1966).

22/ "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. [Citations omitted.] . . . 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' . . . This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Id. at 177-78.

adamant refusal to undertake either the judicial fashioning of criminal punishments, United States v. Evans, 333 U. S. 483 (1948), or the judicial fashioning of procedures for the imposition of criminal punishments, United States v. Jackson, 390 U. S. 570 (1968).[23] Under the rule of law guaranteed by Due Process, the creation of criminal sanctions is, quite simply, "no part of [judges'] . . . duties." United States v. Reese, 92 U. S. 214, 221 (1875).

The question here is whether the North Carolina Supreme Court has infringed that principle, or whether the state-law characterization of what was done in Waddell as a mere application of severability doctrine saves palpable judicial promulgation of the harshest penalty known to mankind[24] from the constitutional

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23/ "It is one thing to fill a minor gap in a statute -- to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." Id. at 580.

24/ See the opinion of Mr. Justice Sharp, dissenting in State v. Waddell, 282 N.C. 431, ___, 194 S.E.2d 19, 48 (1973):

> "This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary 'from death or life imprisonment in the discretion of the jury to mandatory death.'"

charge of lawlessness. The question is not, of course, whether four or three Justices of the North Carolina Supreme Court more nearly guessed what the North Carolina legislature might have wanted in the wake of Furman, in light of the fact that its last pronouncement on the subject -- a quarter-century old -- was long sealed together with the irremediable fates of those who had been chosen to live or to die under the discretionary sentencing regime for which it then unmistakably opted.[25/] Rather the question is whether judicial fiat, with nothing more than the profession of that kind of guesswork to connect it with the regular and accepted method of providing by law for the punishment of crimes, can withstand scrutiny under federal constitutional guarantees designed as limitations upon the lawless exaction of overbearing and unauthorized criminal penalties.

25/ State v. Waddell, 282 N.C. 431, ____, 194 S.E. 2d 19, 26 (1973); State v. Mathis, 236 N.C. 508, 53 S.E.2d 666 (1949); and see note 12, supra.

C. The Perpetuation of Arbitrary Discretion in the Selection of Those Who Must Die.

The third issue presented is whether the capital trial procedure approved for North Carolina by the Waddell decision violates Furman's prohibition of arbitrary selectivity in the administration of the death penalty. Although the prevailing opinions in Furman differ somewhat regarding the questions left unanswered by the Furman holding, they all condemn at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic selective processes.[26/] The form of those

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26/ The concurring Furman opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-374) shared the view that the death penalty is unconstitutional per se, regardless of the presence or absence of discretion in the procedural system whereby it is applied.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional," 408 U.S. at 257, but held the death sentences under review in Furman and companion cases unconstitutional under the Eighth and Fourteenth Amendments because they were the result of a procedure which discriminated against certain defendants upon the basis of "race, religion, wealth, social position [and] class" and which "[gave] room for the play of such prejudices." 408 U.S. at 242.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question [whether "the infliction of the death penalty is constitutionally impermissible in all circumstances"], 408 U.S. at 306, since he found that the death sentences under review were "wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore in violation of the Eighth and Fourteenth Amendments. "[O]f all the people convicted of rapes and murders . . . , many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote omitted).

Mr. Justice White declined to consider the question of whether "the death penalty is unconstitutional per se," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

processes can hardly be thought constitutionally dispositive. See Commonwealth v. A Juvenile, 1973 Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[27] What is important is their result: a lawless and capricious dispensation of life and death, in which death sentences are "freakishly imposed." Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring).

In considering whether the Waddell procedures comply with Furman or whether the North Carolina Supreme Court has merely displaced the focus, lowered the visibility, diffused the responsibility, and thereby increased the predictable arbitrariness and discrimination of persisting discretionary processes for the administration of the death penalty,[28] this Court will

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27/ In this case, the Supreme Judicial Court of Massachusetts ruled that Furman invalidated a death sentence under a "mandatory" death penalty statute, if arbitrary procedures made it possible for some defendants to escape being subjected to the extreme punishment. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was "mandatory" under Mass. Gen. Laws Ann. c.265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since Furman invalidated "discretionary imposition of the death sentence," 300 N.E. 2d at 442 (emphasis in original), regardless of where in the process this discretion was lodged.

28/ The discretion which is concealed but inevitable in a purportedly "mandatory" death-sentencing system is likely to be influenced by impermissible considerations to at least as great an extent as the visible discretion that Furman found unconstitutional. North Carolina's experience with a "mandatory" statute prior to 1949 reflects this point. Between 1910 and 1949, 75% of all persons received under sentence of death were non-white; between 1950 and 1972, 63% of those so received were non-white. Similarly, 80% of persons executed under the pre-1949 "mandatory" system were non-white; 73% of executions under the post-1949 "discretionary" system were of non-whites. (Data compiled from BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3, (North Carolina Office of Corrections, September

want to consider the following characteristics, among others, of North Carolina law and practice:

28/ cont'd.

1973)). It appears that under the "mandatory"system created by the Waddell decision similar forces are at work: as of June 1, 1974, 24 of the 34 defendants condemned to die for crimes committed between January 18, 1973 (the date of Waddell) and April 8, 1974 (the effective date of the new North Carolina capital punishment statute), or 71%, are non-white, approximately the percentage of those condemned to die who were non-white under the pre-Furman "mandatory" system. Death sentences have been affirmed or imposed under the Waddell procedures in the following cases:

State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 36 (1974); State v. Dillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd __ N.C. __ , 203 S.E. 2d 786 (April 10, 1974); State v. Monk, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Britt, Robeson County Superior Ct., No. 73-Cr-6567 (September 6, 1973), rev'd ___ N.C. ____, ___S.E.2d ___, N.C. Sup. Ct. No. 36 (Robeson) (May 15, 1974); State v. Spicer, New Hanover County Superior Ct., No. 73-Cr-8034 (September 12, 1973), rev'd ___ N.C. ___, ___S.E.2d ___, N.C. Sup. Ct. No. 25 (Hanover) (May 15, 1974); State v. Ward, Edgecombe County Superior Ct., No. 73-Cr-6706 (September 19, 1973); State v. Fowler, __ N.C. __ , 203 S.E.2d 803 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Bell, Robeson County Superior Ct., No. 73-Cr-12351 (October 18, 1973); State v. Sparks, Guilford County Superior Ct., No. 73-Cr-19776 (November 1, 1973); State v. Anthony Carey, Mecklenburg County Superior Ct., No. 73-Cr-46179 (November 8, 1973); State v. White, Alamance County Superior Ct., No. 73-Cr-12672 (December 6, 1973); State v. Brown, Edgecombe County Superior Ct., No. 72-Cr-7238 (December 9, 1973); State v. Hines, Edgecombe County Superior Ct., No. 73-Cr-7239 (December 9, 1973); State v. Walston, Edgecombe County Superior Ct., No. 73-Cr-7378 (December 9, 1973); State v. Albert Carey, Mecklenburg County Superior Ct., No. 73-Cr-6158 (December 11, 1973); State v. Vick, Beaufort County Superior Ct., No. 73-Cr-5687 (December 12, 1973); State v. Lampkins, Forsyth County Superior Ct., No. 73-Cr-43023 (January 19, 1974); State v. Pruitt, Cumberland County Superior Ct., Nos. 73-Cr-35545, 35546 and 35548 (January 29, 1974); State v. Williams, Wake County Superior Ct., No. 73-Cr-32521 (January 31, 1974); State v. Woods, Catawba County Superior Ct., Nos. 73-Cr-20546 and 20545 (January 28, 1974); State v. Patterson, Forsyth County Superior Ct., No. 73-Cr-22457 (February 5, 1974); State v. McCall, Transylvania County Superior Ct.,Nos. 73-Cr-1828 and 1829 (February 9, 1974); State v. Avery, Bertie County Superior Ct., No. 73-Cr-2247 (February 17, 1974);

1. Prosecutorial Discretion.

In North Carolina, the Solicitor is charged with the duty to "prepare the trial dockets [and] prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district," N.C. Gen. Stat. §7A-61 (1971 Cum. Supp.). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions, State v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953), including not only absolute discretion whether and what to charge, but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment, State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971); and see State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951). The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is State v. Cuson, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that

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20/ cont'd.

State v. McLaughlin, Robeson County Superior Ct., Nos. 73-Cr-18024, 74-Cr-228, 74-Cr-229, 74-Cr-230, 74-Cr-231, 74-Cr-232 (February 28, 1974); State v. Burns, Onslow County Superior Ct., No. 74-Cr-1012 (March 1, 1974);

there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The Court rejected this contention, commenting that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And the majority opinion in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that either the Eighth or the Fourteenth Amendment required any limitation of the unfettered discretion of the Solicitor: "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

Without any guidance whatsoever, then, a Solicitor is free to make the decision whether an indictment will be sought for first or second degree murder, for rape, or assault to rape. He may thus "without violating [his] trust or any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances of the crime." Furman v. Georgia, supra, at 314 (Mr. Justice White concurring). This prosecutorial discretion doubtless accounts in considerable part for the striking fact, for example, that there have been only two convictions[29/] for

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29/ State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd ___ N.C. ___, 203 S.E.2d 786 (April 10, 1974). State v. Henderson, Alamance County Superior Ct., No. 73-Cr-7771 (September 5, 1973), aff'd 285 N.C. 1, 203 S.E.2d 10 (March 13, 1974), petition for cert. filed, June, 1974 (No. 73-). The petitioner in Henderson was also convicted and sentenced to die for the crime of rape.

first degree burglary during the past year of Waddell's implementation in a State where there were about forty convictions annually for this crime in the recent past,[30] and where 39,210 "burglaries and housebreakings" were reported in 1972.[31] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary prosecutions despite clear evidence of this crime.

A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under the regime of Waddell. In State v. Spicer, N.C. Sup. Ct., No. 25 (New Hanover), decided May 15, 1974, two persons were tried and convicted for murder during the course of an armed robbery.[32] A third person, one Brailford, had helped plan the

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30/ In 1955, the North Carolina Department of Justice ceased keeping separate statistics for persons convicted of First Degree Burglary and Second Degree Burglary. The Biennial Report of the Attorney General, Vol. 32 at 515, reveals that in 1952, there were 47 convictions for First Degree Burglary (with 15 "Other Dispositions" of First Degree Burglary charges); in 1953, there were 33 convictions for this crime, with 10 "Other Dispositions," ibid.; in 1954, there were 35 convictions and 26 "Other Dispositions," ibid., Vol. 33 at 377.

31/ FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1972 (Aug. 1973) at 74. The FBI Uniform Crime Report statistics reflect reported crimes, not convictions, and the reported "burglaries and housebreakings" are not necessarily equivalent to the total number of statutory First Degree Burglaries which occurred in the State during 1972.

32/ The conviction of Isaac Monk, also found guilty of first degree murder and sentenced to death in this incident, is pending on appeal in the North Carolina Supreme Court. Monk v. State, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973).

robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." Id., slip op. at 9. The Court thus described Brailford's role in the crime:

> "[T]he State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated that he expected his cut . . . . The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Id., supra, at 10-11.

2. Plea Bargaining.

Under the Waddell procedures, there is no limit on the power of a Solicitor to accept a plea of guilty to a lesser included offense by a defendant charged with a capital crime, or to nol pros a capital indictment entirely. It is unclear how much plea bargaining in capital cases occurs in North Carolina,[33/] but the critical point is that it is utterly unregulated: the discretion of a Solicitor to accept a plea to a lesser offense in a capital case being quite as untrammelled as the freedom of a jury to recommend mercy in a pre-Waddell capital case. One instance of that discretion is State v. Wiggins, Bertie County Superior Ct., No. 73-Cr-2383, in which a 14 year old defendant was indicted for the rape of a nine year old girl, a potentially capital offense. On February 19, 1974, the defendant was permitted to enter a guilty plea to charges of assault with intent to rape and of assault with intent to kill, and received sentences of fifteen years and five years.

33/ Guilty pleas are said to account for up to 90% of all criminal convictions in the United States. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

Such cases doubtless reflect the long-recognized function of plea bargaining under a purportedly "mandatory" sentencing statute: it "provides the opportunity to individualize justice . . . . Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[34/]

34/ Heath, "Plea Bargaining -- Justice Off the Record," 9 WASHBURN U.L. REV. 430, 455 (1970).

3. Jury Discretion

Even when a North Carolina jury has no admitted sentencing discretion, it still retains power to spare a capital defendant's life by finding him guilty of a lesser included offense. If there is any evidence to support the finding of such an offense, a defendant may demand a lesser-included-offense instruction as a matter of right.[35/] N.C. Gen. Stat. §15-170 provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of any attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime . . . ."

35/ "If . . .there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." State v. Knight, 284 N.C. 384, 391, 103 S.E.2d 452, 456 (1958)(quoting State v. Spivey, 152 N. C. 676, 686, 65 S.E. 995, 999 (1909)); State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right. State v. Hicks, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); State v. Dubois, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Roseman, 279 N.C. 573, 184 S.E.2d 289 (1971); State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971); State v. Brown, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); State v. Cox, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime. State v. Mays, 225 N.C. 480, 35 S.E.2d 494 (1945); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); State v. Beard, 207 N.C. 673, 178 S.E. 242 (1935); State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934). However, if such a charge is given and if a defendant is convicted of the lesser included offense, the conviction will nevertheless be affirmed on appeal, even if it appears irrational on the facts of the case. See State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), and discussion, infra.

And N.C. Gen. Stat. § 15-169 provides that:

> "[o]n the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

The right to a lesser-included-offense charged is considered so important in North Carolina that its omission is held to be reversible error even when the defendant fails to request such a charge. State v. Wagoner, 249 N.C. 637, 107 S.E.2d 63 (1959); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970). See State v. Moore, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); State v. DeGraffenreid, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). The Supreme Court of North Carolina has frequently reversed convictions for capital offenses[36/] because the trial court failed to give a charge on second degree murder,[37/] voluntary

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36/ The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

37/ State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936); State v. Gause, 227 N.C. 26, 40 S.E.2d 463 (1946); State v. Knight, 284 N.C. 384, 103 S.E.2d 452 (1958). When the State attempts to prove "Willful, deliberate and premeditated killing," N.C. Gen. Stat. § 14-17, which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. § 15-172, and since "the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant." State v. Todd, 264 N.C. 524, 529, 142 S.E.2d 154, 158 (1965). See also, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

manslaughter,[38] or involuntary manslaughter[39] in first degree murder cases, or because it failed to charge on assault with intent to rape in rape cases.[40]

Moreover, a jury may be charged on a lesser included offense where there is no evidence to support such a charge, and a conviction for the lesser offense will be sustained on appeal.[41]

38/ State v. Merrick, 171 N.C. 788, 88 S.E. 501 (1916); State v. Robinson, 188 N.C. 784, 125 S.E. 617 (1924); State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959). Cf. State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

39/ State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971). Cf. State v. Danny Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

40/ State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923). See also, State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957); State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Webb, 20 N.C. App. 199, 200 S.E.2d 840 (1973). Cf. State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 116-118 (1972) (Bobbitt, CJ, dissenting). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." State v. Green, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

41/ The Supreme Court of North Carolina has occasionally disapproved of this practice, State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); State v. Allen, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); State v. Pentley, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917). In State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In State v. Quick, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him." 42/

42/ "An error on the side of mercy is not reversible . . . ." State v. Fowler, 151 N.C. 731, 66 S.E. 567 (1909). Accord: State v. Rose, 155 N.C. 436, 71 S.E. 332, 337 (1911). See also State v. Ratcliff, 199 N.C. 9, 153 S.E. 605, 606 (1930); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); State v. Vestal, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

In State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "If we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then . . . [and] [w]hen they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

To insure that the jury is aware of the consequences of its decision in a capital case, the Supreme Court of North Carolina recently ruled that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence . . . sufficient compelling reason exists to justify . . . informing the jury of the consequences of their possible verdicts." State v. Britt, N.C.Sup.Ct., No. 36 (Robeson), decided May 15, 1974, [Appendix D, infra] slip op. at 16. The Court also ruled that "[c]ounsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged . . . .[He may] in his argument to the jury . . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." Id. at 17-18. This holding implements the power of the jury to avoid imposing the death penalty in a

sympathetic case, either by convicting of a lesser included offense or by returning a verdict of not guilty.[43/] Thus, under North Carolina law, a double level of discretion may affect the jury's choice of a life or death verdict in a case where all the evidence points to guilt of a capital offense or of nothing: the trial judge has discretion to submit such lesser offenses, and the jury has discretion to commit for them.

43/ Wicker, "Christmas on the New Death Row," New York Times, Dec. 25, 1973, p. 18, col. 1:

> "Raleigh, N.C. Dec. 24 . . . In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; . . . Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

4. Executive Clemency.

The North Carolina Constitution provides that:

> [T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. Article III, §5(6).

Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of two hundred thirty-five (235) of three hundred fifty-eight (358) condemned prisoners were commuted. The chief executive has thereby commuted 65.6 percent of the death sentences imposed in the State over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature the right to prescribe the "manner of applying for pardons" but leaves the grant or denial subject only to "such conditions as [the Governor] may think proper." Indeed, the Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> [i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

Under a procedural system in which the death penalty is purportedly "mandatory," the clemency authority has commonly functioned as the aspect of the criminal justice system that responds to "mitigating factors" -- factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the exaction of punishment. 44/ A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations or death sentences after the 1947 and 1949 statutory amendments giving juries the option of imposing life sentences for the four crimes which had theretofore carried mandatory death penalties. 45/ By withdrawing that option from juries in 1973, the Waddell decision obviously displaced, but equally obviously did not reduce, the operation of discretionary selectivity in North Carolina's death-sentencing practices.

44/ Note, Executive Clemency in Capital Cases, 39 N.Y.U.L.REV. 136, 165-166 (1964).

45/ Johnson, Selective Factors in Capital Punishment, 36 SOCIAL FORCES, 165, 166-7 (1957). Behre notes that while 64 percent of condemned persons escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38 percent for the period between 1949 and 1962. Undoubtedly, a large proportion of condemned persons who avoided the death penalty did so by commutation. BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3. (North Carolina Office of Corrections, September 1973).

D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency

Eighth Amendment standards are not static, and the prohibitions of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U. S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U. S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-328 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the the truism that government remains "the potent, the omnipresent teacher"[46/] even when it chooses to

46/ Olmstead v. United States, 277 U. S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'"[47] While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments, a partial diminution of retributive sentiment,[48] and a guarded, but increased optimism about the possibilities of rehabilitation. At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 173, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), at 1.

is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U. S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons[50]--who were, for the most part, members of

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49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.[51/]

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 300 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U. S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

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59/ (Cont'd)

ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.

The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Of the 3,859 persons executed under civil authority in the United States between 1930 and 1968, only 191 were executed during the 1960's and only 25 were executed after 1963. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 361-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of executions is insured by law in that every American jurisdiction now

death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a concommittant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution.[52] Increased respect fo

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51/ (Cont'd)

forbids public executions. Movements to Abolish the Death Penalty in the United States, 284 ANNALS 124, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death.[53/]

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man.

Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll.

As the California Supreme Court has pointed out,"the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, [illegible] (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. [illegible] 289, at 295-300 (1971).

The condemned prisoner, more than the ordinary [illegible] subjected to the "fate of ever-increasing fear and [illegible]" Trop v. Dulles, 356 U. S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). The ordeal of awaiting execution frequently produces insanity, see Solesbee v. Balkcom, 339 U. S. 9, [illegible] (1950) (Justice Frankfurter, dissenting), or other extreme manifestations of psychological decompensation.

Moreover, existing data suggests what imagination intuits, there is likely to be unconscionable physical pain before consciousness is lost. "Although our information is inconclusive, it appears that there is no method available that guarantees an immediate and painless death." Furman v. Georgia, supra, at 237 (Mr. Justice Brennan concurring).

And there is, finally the enormity and irreversibility of the act of condemning and terminating a known existence [illegible] which denies absolutely the very thing [illegible] was created to protect: the dignity of man.

The moral development which has accompanied advances in the understanding of the causes and control of crime [illegible] reflected in the increasingly careful limitation [illegible] punishment of death calls upon this Court now to reconsider the question of the legitimacy of that punishment under the [illegible] Amendment's command: "The dignity of man [illegible] progress of a maturing society."

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[1] See Trop v. Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

APPENDIX C

Pages 72-78, Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975).

the accused of a jury that is "truly representative of the community," Smith v. Texas, supra; see Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970) -- is violative of petitioner's right to equal protection and due process.

C. The Exclusion of a Veniremen with Conscientious Scruples Against Capital Punishment Deprives Petitioner of his Sixth Amendment Right to a Representative Jury.

This case also presents the significant constitutional question whether any death qualification of a jury is permissible in the wake of the incorporation of the Sixth Amendment's jury-trial guarantee into the Fourteenth. The Witherspoon decision was handed down only a few days after Duncan v. Louisiana, 391 U.S. 145 (1968); Witherspoon's trial, of course, long pre-dated Duncan; and the cases in which the Court has since applied Witherspoon have all been pre-Duncan cases or cases in which no Sixth Amendment challenge to the practice of death qualification was made. See Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); and the twenty-three cases reversed on authority of Witherspoon in 401 U.S. at 968-969 (1971). Prior to the effective date of Duncan (see Pickelsimer v. Wainwright, 375 U.S. 831 (1958)), the only federal constitutional rights enjoyed by a state criminal defendant in connection with the selection of his trial jury were those vouchsafed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court had then recognized the obligation of the States not to exclude racial minority groups from the petit jury, see Smith v. Texas, 311 U.S. 128 (1940);

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Fernandez v. Texas, 317 U.S. 475 (1954), but had not yet imposed upon state criminal trials the more exacting obligations of the Sixth Amendment. Compare Hoyt v. Florida, 368 U.S. 57 (1961), with Taylor v. Louisiana, 43 U.S.L.W. 4167 (U.S., Jan. 21, 1975).

Since Duncan, however, the Court has recognized that the Sixth Amendment guarantee of jury trial entitles a state criminal defendant to "a petit jury [drawn] from a representative cross-section of the community." Taylor v. Louisiana, supra, 43 U.S.L.W. at 4165. In Taylor -- which marks only the latest exemplification of this principle [66/] -- the Court held that a male criminal

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66/ Between the dates of Duncan and Taylor, the Court clearly said several times that the selection of petit jurors from a representative cross-section of the community was an essential requirement of the Sixth Amendment. In Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970), the Court suggested that such a requirement was imposed upon the States by Duncan, stating that the "very idea of a jury" was that of a "'body truly representative of the community'" (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) and that jury lists must "'reasonably reflect a cross-section of the population,'" 396 U.S. at 332 (quoting Fay v. New York, 332 U.S. 261, 284 (1953)). See also Whitus v. Georgia, 385 U.S. 545, 550 (1967); Avery v. Georgia, 345 U.S. 559, 562 (1953); and Peters v. Kiff, 407 U.S. 493, 502-506 (1972) (opinion of Mr. Justice Marshall).

defendant had standing to contest the exclusion of women from his trial jury without the necessity of demonstrating any specific prejudice because the exclusion of a distinctive population group "deprived him of the kind of fact finder to which he was constitutionally entitled." Id. at 4168. 67/

67/ "We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against exercise of arbitrary power -- to make available the common-sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . . The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

Taylor v. Louisiana, supra, 43 U.S.L.W. at 4170.

As the Court has progressively clarified the nature of the "jury" guaranteed in state criminal proceedings by the Sixth Amendment, the cross section requirement has become increasingly essential and the permissibility of death qualification has therefore become increasingly suspect. Williams v. Florida, 399 U.S. 78 (1970), held that a jury of twelve was not an indispensable part of the Sixth Amendment right: all the Sixth Amendment required was that the jury be large enough "to provide a fair possibility for obtaining a representative cross-section of the community . . . " Id. at 100. This was so because the critical function of the jury was to provide a citizen group, representative of the community, which would serve to check possible Government oppression of criminal defendants. "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." Ibid. In Apodaca v. Oregon, 406 U.S. 404, 410 (1972), the Court similarly ruled that the Sixth Amendment did not require conviction by unanimous verdict in State criminal cases, since the jury's function could be served without unanimity "as long as it consists of a group of laymen representative of a cross section of the community."

The principle that no identifiable group may be systematically excluded from jury panels is not limited to groups defined by race, of course. See Taylor v. Louisiana, supra;

White v. Crook, 251 F. Supp. 401, 408-409 (M.D. Ala. 1966) (exclusion of women); Labat v. Bennett, 365 F.2d 698 (CA5 1966), cert. denied, 385 U.S. 991 (1967)(exclusion of wage earners); State v. Fehrenbach, 240 Md. 121, 213 A.2d 475 (1965)(exclusion of agnostics and atheists).

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

Hernandez v. Texas, 347 U.S. 475, 478 (1954). As the Court reiterated in Peters v. Kiff, supra, 405 U.S. at 413, the Sixth Amendment forbids "systematic exclusion of identifiable segments of the community from jury panels," because all groups have "the right to participate in the overall legal processes by which criminal guilt and innocence are determined." And the Court plainly recognized in Witherspoon that jurors with scruples against the imposition of the death penalty form a distinctive, coherent and sizeable group in most communities from which juries are selected. 68/

68/ See also, e.g., Bronson, On the Conviction Proneness and Representative Aspects of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. COL. L. REV. 1 (1970); Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 STAN. L. REV. 1245 (1974).

Since a venireman was excluded from petitioner's post-Duncan trial jury on the sole ground of her conscientious scruples against the death penalty, the issue is presented here whether such an exclusion may be justified under the exacting standards of the Sixth Amendment. Admittedly, a defendant cannot object under the Sixth Amendment to the exclusion for cause of veniremen who are related to him or who have a monetary interest in the outcome of his suit, because of the danger that such veniremen, if selected as jurors, would bring to the jury's deliberations attitudes that are inconsistent with their proper duty as jurors to determine the truth impartially. Under a statutory scheme like Florida's, however, it is the rightful duty of the jury to express community attitudes about punishment: "one of the most important functions any jury can perform [in the administration of such a statute] . . . . is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon v. Illinois, supra, at 520 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Indeed, the Florida capital punishment statute implicitly contemplates the expression of a broad range of community sentiment regarding punishment, since it provides for a recommendation of sentence by a "majority of the jury," Fla. Stat. §921.141(3), and allows the trial judge to overrule this "recommendation," ibid. It would thus have been impossible for Venireman Miller to have "hung" the jury on the issue of sentence (assuming even that she

adamantly refused to vote in favor of the death sentence -- an assumption not justified by the voir dire record, see pp. 61-67, supra); and the vote of a majority of the jury to recommend life imprisonment would itself not have precluded the trial judge's imposition of a death sentence.[69/] The Court should determine, therefore, whether in this setting a criminal defendant is entitled by the Sixth Amendment to a jury panel which reflects a fair cross section of community sentiment -- a panel from which veniremen such as Mrs. Miller cannot be excluded for cause simply on account of their views regarding capital punishment.

69/ Jury recommendations of mercy have not forestalled the imposition of the death sentence in at least 16 cases. See note 13, supra.

APPENDIX D

Owens v. State, Ga. Sup. Ct. No. 29381 (February 12, 1975).

In the Supreme Court of Georgia Decided: FEB 12 1975

29381. OWENS v. THE STATE

HILL, Justice.

This case is before this court on appeal and mandatory review of the death sentence. The appellant was indicted for murder occurring on January 21, 1974. Following a sanity trial at which the jury found against the plea of insanity, trial was held on May 27, 1974. The death sentence was imposed upon the verdicts.

The evidence showed that about 9:45 on the morning of January 21, 1974, Mrs. Pearl Fryer was standing at the "check-out" in Matt's Variety Store, in Manchester, Meriwether County, Georgia. Sammie Lewis Owens, the appellant, came into the store and stabbed Mrs. Fryer several times with a knife, causing her death. The appellant was not acquainted with Mrs. Fryer. After the stabbing he was pursued by two men who had been in the store. He was apprehended by a Manchester policeman as he fled the scene. Medical examination of the victim's body revealed that death was caused by four stab wounds in the chest.

The sheriff testified that after arrest and following advice concerning his rights and execution of a waiver of those rights, appellant stated that on the morning of the stabbing ". . . he went to the bus station to see what time the bus was going to leave to go to Atlanta. He said, they told him at 9:52. So, he left there and walked up to Main Street. He said, he walked in the store and he said, he remembered walking in and he said, he remembered stabbing Mrs. Fryer."

After taking the stand in his own behalf and testifying that he had the feeling everybody was against him, that he felt that

somebody was trying to do something to him, and that he heard voices, appellant admitted, both on direct and cross examination, stabbing the victim.

Appellant filed a motion for new trial which was amended to supplement the general grounds. The motion was overruled and this appeal followed.

Appellant enumerates as error: (1) That the trial court erred in overruling the motion for new trial on the general grounds; (2) That the court erred in excluding potential jurors who stated that they had conscientious objections to capital punishment and in overruling trial counsel's objection to the exclusion of those jurors; and (3) That the court erred in applying Georgia's unconstitutional death statute to appellant and in refusing to declare unconstitutional Georgia Laws 1973, pp. 159-172, which provides for the discretionary imposition of the death penalty.

1. The foregoing summary of the evidence admitted at the trial indicates that the appellant killed the victim by stabbing her to death. Although conflicting, there was evidence to support the jury's finding that the accused was sane at the time of commission of the offense. The enumeration of error on the general grounds with respect to guilt or innocence is without merit. Insofar as the general grounds pertain to punishment, these considerations are within the court's responsibility for sentence review.

2. In enumeration 2 appellant avers that the trial court erred in excluding potential jurors who stated that they had conscientious objections to capital punishment and in overruling trial counsel's objection to the exclusions.

The standards of jury selection applicable in death cases are set forth in Witherspoon v. Illinois, 291 US 510

(SC , LE2d), as amplified in Boulden v. Holman, 394 US 478 (SC , LE2d), and Maxwell v. Bishop, 398 US 262 (SC , LE2d). Witherspoon held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon, supra, at 521-23. Such a venireman cannot be excluded unless he makes it unmistakably clear that he would vote against the death penalty regardless of what transpires at trial, or that his attitude on the death penalty would prevent him from impartially passing on the issue of guilt, or that he could not subordinate his personal feelings on the death penalty to his oath as a juror to obey the law of the State as charged by the trial court. See Simmons v. State, 226 Ga. 110 (12) (SE2d); Miller v. State, 224 Ga. 627 (8) (SE2d).

In the present case, although portions of the voir dire examination of the veniremen appear in the transcript, the examination as it relates to Witherspoon did not appear in the transcript as it was originally transmitted to this court. The clerk of the trial court states that the reporter has nothing more on the questioning. The transcript does show that appellant objected to the method of selecting the jury.

Normally it is the obligation of the party who asserts error to show it affirmatively by the record [see Kemp v. State, 226 Ga. 506 (2) (SE2d)]. However, Code Ann. § 27-2537 requires that this court determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." In Ross v. State, 29083, Ga. (SE2d), this court forecast the result reached in this case by

requiring the Witherspoon examination to be transcribed and transmitted, citing Funicello v. New Jersey, 403 US 948 (SC , LE2d). In Funicello, the petitioner sought post-conviction relief relative to the imposition of the death penalty. His attack was based on the Witherspoon issue and on the double sentencing standard issue involved in Jackson v. United States, 390 US 510 (SE2d). The New Jersey Supreme Court had denied the requested relief, Funicello v. New Jersey, 52 N.J. 263, 245 A2d 181, 196, and had said: "As to [petitioner], the [Witherspoon] issue is asserted in abstract terms, without any reference to the voir dire examination. In fact, no transcript of the voir dire was submitted either on the review or on direct appeal from the judgment of conviction, and so far as we have been able to learn, the testimony of the veniremen was never transcribed." In its memorandum opinion the United States Supreme Court reversed the judgment insofar as it imposed the death sentence and remanded for further proceedings, citing Witherspoon, Boulden and Maxwell, supra, as well as Jackson v. Georgia, 408 US 238, discussed below.

Georgia Code Ann. § 6-805(d) provides that "Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings . . . and all other proceedings which may be called in question on appeal . . . shall be reported. . . ." In light of Witherspoon, supra, Code Ann. § 27-2401 does not diminish this requirement.

In the instant case, the amended motion for new trial stated that the trial court excluded potential jurors who stated that they had conscientious objections to the death penalty, and that movant objected to said exclusion but that the court overruled the objection and allowed the jurors to be excluded. The recital of facts contained in the amendment was approved as true and correct.

For the reasons given above, a motion made by the State for permission to supplement the trial transcript pursuant to Code Ann. § 806(f) has been denied. A post-trial examination of lawyers and court officials, or of excluded veniremen, would not be a satisfactory means for this court to perform its review function.

We hold that failure to record the Witherspoon voir dire in a case in which the sentence of death is imposed, is reversible error. We therefore reverse the judgment in this case insofar as it imposed the death sentence and remand it to the trial court for a new trial on the question of the sentence, Horton v. State, 228 Ga. 690 (187 SE2d 677); Cash v. State, 231 Ga. 285 (201 SE2d 625); Rose v. State, Ga. , supra.

3. In enumeration 3 the appellant makes a general attack on the death sentence imposed under Ga. Laws 1973, pp. 159-172 (Code Ann. § 27-2531.1 et seq.), as being unconstitutional according to Furman v. Georgia and Jackson v. Georgia, 308 US 238 (92 SC 2726, 33 LE2d 346), and alleges error in refusal by the trial judge to declare the statute unconstitutional because it involves discretion. This court has upheld the constitutionality of the statute in Coley v. State, 231 Ga. 829 (204 SE2d 612), Eberheart v. State, 232 Ga. 247 (206 SE2d 12), House v. State, 232 Ga. 140 (205 SE2d 217), and Moore v. State, Ga. (SE2d). We are not persuaded that the decisions in those cases should be reversed.

In Coley and Moore, supra, this court addressed the issue of discretion in the Georgia Death Penalty Statute, Code Ann. § 26-2001 and Code Ann. § 27-2534.1 et seq., in light of Furman v. Georgia and Jackson v. Georgia, supra, and found that the system of dispensation of the death penalty provided by the state does not offend the principles of decision of the U. S. Supreme Court in Furman and Jackson (Coley, supra, p. 835). Although we find

this enumeration to be without merit, the constitutionality of the application of the death penalty to appellant must be determined upon review of the sentence by this court pursuant to the cited statute. However, in light of our holding in Division 2 of this opinion, the death penalty is reversed and the case is remanded to the trial court.

Judgment reversed with direction. All the Justices concur, except Hunter and Ingram, J.J., who dissent, and Jordan, J., disqualified.

GUNTER and THOMAS, Justices, dissenting.

The majority opinion does not reach the trial court's charge to the jury on the issue of insanity in this case. The record shows this charge placed the burden of proof on the defendant and, therefore, is constitutionally infirm under the dissenting opinions filed in Grace v. State, 231 Ga. 113, 117-120.